

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 179

LILLIAN A. WEADE, FREDERICK M. WEADE AND
ROBERTA E. STEINMEYER, PETITIONERS,

vs.

DICHMANN, WRIGHT & PUGH, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 27, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

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1948

**IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

No. 5696

DICHMANN, WRIGHT & PUGH, INCORPORATED, a Delaware
Corporation, Appellant,

VS.

**LILLIAN A. WEADE, FREDERICK M. WEADE, and ROBERTA L.
STINEMEYER**, Appellees

Appeal from the District Court of the United States for the
Eastern District of Virginia, at Norfolk

[File endorsement omitted.]

[fol. 1] **IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA**

Civil Action No: 617

**LILLIAN A. WEADE, 78 Main Street, Hilton Village, Newport
News, Virginia, and FREDERICK M. WEADE, 78 Main Street,
Hilton Village, Newport News, Virginia, Plaintiffs,**

V.

**DICHMANN, WRIGHT & PUGH, INC., a Delaware Corporation,
Western Union Building, Norfolk, Virginia, and GEORGE
C. HUDGINS, c/o Washington-Hampton Roads Line, Nor-
folk, Virginia, Defendants.**

COMPLAINT

Lillian A. Weade and Frederick M. Weade, plaintiffs,
jointly and severally complain of Dichmann, Wright &
Pugh, Inc., a Delaware Corporation, and George C. Hudgins,
sometimes Master of the SS METEOR, defendants, for this,
to-wit:

1. Jurisdiction is founded on diversity of citizenship and
amount involved in this action, i.e., plaintiffs are citizens of
the State of Virginia, and the defendant, Dichmann, Wright

[fol. 2] & Pugh, Inc. is a corporation, incorporated under the laws of the State of Delaware and the defendant, George C. Hudgins, Master of the SS METEOR at the dates herein-after related, is a citizen of the United States, the exact place of his residence being unknown to plaintiffs. The matter here in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3000.00).

2. On, to-wit, August 4, 1945, plaintiff, Lillian A. Weade, a member of the white race, was a paid passenger on the SS METEOR operated as a common carrier by defendant, Dichmann, Wright & Pugh, Inc., from Old Point Comfort, Virginia, to Washington, D. C. by way of the Chesapeake Bay and Potomac River, and at said time and place defendant, George C. Hudgins, was master and captain of said steamship. The plaintiff, Lillian A. Weade, engaged passage and a stateroom on said vessel and paid therefor the full rate charged. While sleeping aboard said vessel in said stateroom during the course of her passage from said Old Point Comfort, Virginia, to Washington, D. C., and as the result of the failure of the defendants to provide protection for sleeping passengers from the personal misconduct of its employees, and/or as a result of the failure of the defendants to use due care in the selection of reliable, competent and careful employees, and/or as a result of the failure of the defendants to provide reasonable safeguards for the protection of passengers on said vessel, and/or as a result of the failure of the defendants to comply with applicable law under the circumstances then existing, the plaintiff, Lillian A. Weade, was assaulted, raped and injured by a negro employee of said defendants. As a result thereof plaintiff sustained serious permanent injuries.

3. The plaintiff sustained injuries to her head, body and limbs. She sustained bruises and abrasions to the right scapula, right forearm and left knee. Plaintiff was violently choked and her neck and eyes were bruised and injured. Plaintiff suffered a severe shock to her nervous system and the same has become and will permanently remain affected and impaired. Plaintiff suffered and will in the future suffer great physical pain and mental anguish as the result of said assault. Plaintiff has undergone and will in the [fol. 3] future undergo hospitalization and medical treatment. Plaintiff was for a long period of time unable to

attend to her usual duties and occupations and plaintiff has been otherwise greatly damaged, all to said plaintiff's damage in the sum of One Hundred Thousand (\$100,000.00) Dollars.

4. The plaintiff, Frederick M. Weade, was and is the husband of the plaintiff, Lillian A. Weade, and as a result of the injuries sustained by the plaintiff as aforesaid, plaintiff, Frederick M. Weade, has been deprived of the services and society of his wife for a long space of time, during which time the plaintiff has suffered great anxiety in mind and has been hindered and prevented from attending to his lawful affairs of business, and plaintiff has incurred and will in the future incur large expense for hospitalization, X-ray medical and nursing treatment and medicines, all to said plaintiff's damage in the sum of Fifty Thousand Dollars (\$50,000.00).

Wherefore, plaintiff, Lillian A. Weade, demands judgment of the defendants in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff, Frederick M. Weade, demands judgment of the defendants in the sum of Fifty Thousand Dollars (\$50,000.00).

A trial by jury is demanded.

(sgd) Edward L. Breeden, Jr., Counsel for plaintiffs,
1108 National Bank of Commerce Bldg., Norfolk;
10 Virginia.

Michael F. Keogh, Esq., Attorney at Law, Woodward Building, Washington 5, D. C., and Breeden & Hoffman, Norfolk, Virginia, p. q.

[fol. 4] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

Civil Action No. 617

[Title omitted]

ANSWER

To the Honorable Sterling Hutcheson,
Judge of the Court aforesaid:

The answer of Dichmann, Wright & Pugh, Inc., to the complaint heretofore filed in this cause, alleges as follows:

1. The complaint fails to state a claim against this defendant upon which relief can be granted.

2. It admits that it is a corporation incorporated under the laws of the State of Delaware, with its principal office in the City of Norfolk, Virginia, and that the plaintiffs are citizens of the State of Virginia. It further alleges that the defendant, George C. Hudgins, also is a citizen of the State of Virginia, with his residence at Mathews Courthouse, Virginia.

[fol. 5] 3. That this court is without jurisdiction to hear and determine this cause, there being no diversity of citizenship as is required by the statute.

4. That the plaintiff, Frederick M. Weade, under the statute in such cases made and provided, is not entitled to maintain the action as alleged in the complaint.

5. It further denies any liability to the said Frederick M. Weade arising out of an alleged tort or of any contract, and avers that the said action is wrongfully joined with the action by Lillian A. Weade, and should be dismissed.

6. Without waiving the above named defenses this defendant further states:

(a) It is a corporation incorporated under the laws of the State of Delaware, with its principal office in the City of Norfolk, Virginia, and is engaged in the general business of a shipping agency, and as such performing services in connection with ships for the owners thereof. It is not a common carrier, and at the time of the acts alleged in the complaint did not own the said steamer Meteor, but only performed certain services in connection with her operation by the War Shipping Administration.

(b) This defendant further alleges that acting as such shipping agent it entered into a service agreement with the War Shipping Administration, as owner of the steamship Meteor, dated January 9, 1943, whereby it was stipulated that it was appointed as the agent of the War Shipping Administration, and not as an independent contractor.

(c) It was further provided by said agreement that the master of the steamer is an agent and employee of the United States; that the agent shall procure and make available to the master for engagement by him the officers and

men required by him to fill the complement of the vessel; that such officers and men shall be procured by the agent through the usual channels and in accordance with the customary practice; and that such officers and members of the crew shall be paid in the customary manner with funds [fol. 6] provided by the United States. Such contract was in full force and effect on August 4, 1945 at the time of the happening of the acts alleged in the complaint.

This defendant therefore alleges that the acts complained of were not committed by any employee, agent or servant of this defendant, or by anyone over whom it had authority or control, nor by one for whose acts this defendant is in any way responsible.

7. With reference to the allegations of the second paragraph of said complaint, this defendant denies that it operated the steamer Meteor as a common carrier between the points designated. It admits that the plaintiff Lillian A. Weade procured passage and a stateroom on the said steamer Meteor, such contract of passage being represented by a ticket issued by the "Washington-Hampton Roads Line, operated by United States of America, War Shipping Administration" for one first class passage from Norfolk or Old Point Comfort, Virginia, to Washington, D. C., and a stateroom card was further issued to said plaintiff Lillian A. Weade, in the name of "Washington-Hampton Roads Line, operated by United States of America, War Shipping Administration."

8. Upon information and belief it denies the remaining allegations of the said second article.

This defendant further states that if the said plaintiff Lillian A. Weade was assaulted by any person engaged as an employee of the War Shipping Administration on board the said steamer, such was an unauthorized act committed while said employee was not in the course of any duty with reference to the said steamer and beyond the scope of his employment.

9. It is ignorant of the matters and things stated in the third paragraph of the complaint. Upon information and belief it denies that plaintiff has sustained damages to the extent alleged and further denies any responsibility therefor.

10. This defendant further states that if such assault was committed as is alleged, no written notice thereof was given

by the plaintiff to the War Shipping Administration within [fol. 7] sixty days of the time of the commission of said act, and the sustaining of said injury, as is required by law.

11. That the plaintiff herself was guilty of contributory negligence which proximately contributed to the commission of the acts alleged.

This defendant therefor prays that this proceeding be dismissed and that the court award to the defendant its costs.

_____, Attorney for Defendant. Dichmann,
Wright & Pugh, Inc., 936 Wainwright Building,
Norfolk, Virginia.

Service of copy accepted this 10th day of September, 1946.

_____, Attorneys for Plaintiffs.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA

Civil Action No. 616

ROBERTA L. STINEMEYER, 1368 Euclid Street, N. W.
Washington, D. C., Plaintiff,

v.

DICHMANN, WRIGHT & PUGH, INC., a Delaware Corporation,
Western Union Building, Norfolk, Virginia

and

GEORGE C. HUDGINS, % Washington-Hampton Roads Line,
Norfolk, Virginia, Defendants

COMPLAINT

Roberta L. Stinemeyer, plaintiff, complains of Dichmann, Wright & Pugh, Inc., a Delaware corporation, and

[fol. 8] George C. Hudgins, sometimes Master of the SS Meteor, defendants, for this, to-wit:

1. Jurisdiction is founded on diversity of citizenship and amount involved in this action, as provided by U. S. C. A., Tit. 28, Sec. 41, subd. (1), i. e. plaintiff is a citizen of

the District of Columbia and the defendant, Dichmann, Wright & Pugh, Inc. is a corporation, incorporated under the laws of the State of Delaware and the defendant, George C. Hudgins, Master of the SS Meteor at the dates hereinafter related, is a citizen of the United States, the exact place of his residence being unknown to plaintiffs. The matter here in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3000.00) Dollars.

2. On August 3, 1945, plaintiff, Roberta L. Stinemeyer, became a passenger aboard the SS Meteor, then operated by the defendant Dichmann, Wright & Pugh, Inc. a corporation, as general agent of the War Shipping Administration, from Old Point Comfort, Virginia, to Washington, D. C., by way of the Chesapeake Bay and Potomac River, and, at said time defendant, George C. Hudgins, was master of the said vessel. The plaintiff, Roberta L. Stinemeyer, had engaged a stateroom with her companion, another female passenger, Lillian A. Weade, on said vessel and during the voyage on the morning of August 4, 1945, while sleeping in said stateroom, was assaulted by threats of violence and bodily harm, restrained and imprisoned in said stateroom against her will, and made the witness of an atrocious and illegal assault upon and rape of her said companion, placed in great fear and nervous shock by an employee of said defendants. As a result thereof plaintiff sustained serious permanent injuries because of the defendants failure to provide protection for its sleeping passengers from the personal misconduct of its employees, defendants failure to use due care in the selection of competent and careful employees and as a result of the failure of the defendants to provide reasonable safeguards for the protection of its passengers.

3. The plaintiff was put in great fear of her life and limb, suffered severe shock to her nervous system and great mental anguish, all of which has become and will permanently [fol. 9] remain a damage and impairment to her nervous system. As a result of the aforementioned injuries plaintiff was for a long period of time unable to attend to her usual duties, and has been otherwise greatly damaged, all to said plaintiff's damage in the sum of Ten Thousand Dollars (\$10,000.00).

Wherefore, plaintiff, Roberta L. Stinemeyer, demands judgement of the defendants in the sum of Ten Thousand Dollars (\$10,000.00).

A trial by jury is demanded.

(Sgd.) Edw. L. Breeden, Jr., Counsel for Plaintiff,
1106 National Bank of Commerce Bldg., Norfolk
10, Virginia.

Michael F. Keogh, Esq., Woodward Bldg., Washington
5, D. C. and Breeden & Hoffman, Norfolk Virginia, p. q.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EAST-
ERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

Civil Action No. 616

[Title omitted]

[fol 10]

ANSWER

To the Honorable Sterling Hutcheson, Judge of the Court
aforesaid:

The answer of Dichmann, Wright & Pugh, Inc., to the
complaint heretofore filed in this cause, alleges as follows:

1. The complaint fails to state a claim against this de-
fendant upon which relief can be granted.

2. It admits that it is a corporation incorporated under
the laws of the State of Delaware; with its principal office in
the City of Norfolk, Virginia. It alleges also that the de-
fendant George C. Hudgins is a citizen of the State of Vir-
ginia with his residence at Mathews Courthouse, Virginia.
It admits that the plaintiff, Roberta L. Stinemeyer, is a
citizen of the District of Columbia.

3. That this court is without jurisdiction to hear and de-
termine this cause, there being no diversity of citizenship
as is required by the statute.

4. Answering the allegations of the second paragraph of
the complaint, this defendant admits that on August 3, 1945
it was acting merely as an agent of the War Shipping Ad-
ministration, and was not engaged as a common carrier in
the operation of the steamer Meteor between Old Point

Comfort, and Washington. It admits that the plaintiff, Roberta L. Stinemeyer, procured passage and a stateroom on the steamer Meteor, such contract of passage being represented by a ticket issued by the "Washington-Hampton Roads Line, operated by the United States of America, War Shipping Administration," for one first class passage from Norfolk or Old Point Comfort to Washington, D. C., and a stateroom card was further issued to said plaintiff, Roberta L. Stinemeyer, in the name of "Washington-Hampton Roads Lines, operated by the United States of America, War Shipping Administration."

Upon information and belief it denies the remaining allegations of the said second article.

[fol. 11] This defendant further states that if the said plaintiff, Roberta L. Stinemeyer was assaulted by any person engaged as an employee of the War Shipping Administration on board the said steamer Meteor, such was an unauthorized act committed while said employee was not in the course of any duty with reference to the said steamer and beyond the scope of his employment.

5. It is ignorant of the matters and things stated in the third paragraph of the complaint. Upon information and belief it denies that plaintiff has sustained damages to the extent alleged, and further denies any responsibility therefor.

This defendant further alleges that the elements of injury and damage as alleged in said complaint are not proper elements recoverable under the law.

6. Without waiving the above named defenses this defendant further states:

(a) It is a corporation incorporated under the laws of the State of Delaware, with its principal office in the City of Norfolk, Virginia, and is engaged in the general business of a shipping agency, and as such performing services in connection with ships for the owners thereof. It is not a common carrier, and at the time of the acts alleged in the complaint did not own the said steamer Meteor, but only performed certain services in connection with her operation by the War Shipping Administration.

(b) This defendant further alleges that acting as such shipping agent it entered into a service agreement with the

War Shipping Administration, as owner of the steamship Methor, dated January 9, 1943, whereby it was stipulated that it was appointed as the agent of the War Shipping Administration, and not as an independent contractor.

(c) It was further provided by said agreement that the master of the steamer is an agent and employee of the United States; that the agent shall procure and make available to the master for engagement by him, the officers and men required by him to fill the complement of the vessel; that such officers and men shall be procured by the agent through the [fol. 12] usual channels and in accordance with the customary practice; and that such officers and members of the crew shall be paid in the customary manner, with funds provided by the United States. Such contract was in full force and effect on August 4, 1945, at the time of the happening of the acts alleged in the complaint.

This defendant therefore alleges that the acts complained of were not committed by any employee, agent or servant of this defendant, or by anyone over whom it had authority or control, nor by one for whose acts this defendant is in any way responsible.

7. This defendant further states that if such assault was committed as is alleged, no written notice thereof was given by the plaintiff to the War Shipping Administration within sixty days of the time of the commission of said act and the sustaining of said injury as is required by law.

8. That the plaintiff herself was guilty of contributory negligence which proximately contributed to the commission of the acts alleged.

This defendant therefore prays that this proceeding be dismissed and that the court award to the defendant its costs.

Attorney for Defendant,
Diehlmann, Wright & Pugh, Inc., 936 Wainwright
Bldg., Norfolk, Virginia.

Service of copy accepted this 10th day of September, 1946.

Attorneys for Plaintiff.

11.

[fol. 13] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION.

Civil Action No. 617

Civil Action No. 616

[Title omitted]

ORDER OF CONSOLIDATION

On motion of the plaintiffs it is ordered that the above entitled cases be and the same are hereby consolidated for the purpose of trial, to which ruling of the Court the defendant, by counsel, duly accepted.

On motion of the plaintiffs, with the consent of the defendant, it is ordered that the plaintiffs' answers to the defendant's interrogatories heretofore received by the Clerk of this Court on the 6th day of March 1947, be and the same are hereby ordered filed.

, U. S. District Judge

Norfolk, Virginia, March 13, 1947.

DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT

page 211:

Mr. Seawell: If Your Honor please, we move to direct a verdict for the defendant on two grounds especially. [fol. 14] The first ground is that, under the contract which has been introduced in evidence in this case, the defendant named Dichmann, Wright & Pugh, Inc., was not the employer of the man who is alleged to have committed the crime.

"The second ground is that the evidence fails entirely to show that at the time of the occurrence this man was on duty or acting within the scope of his authority or employment. I think that the decisions are pretty emphatic upon that question.

Those are the two chief grounds upon which we rely.

I may say that another, third ground would be that these ladies, whether for their personal comfort or not, did not heed the warning that we shall prove was in the state-room, and allowed not only their door to remain open but

their window and shutter to remain open, thereby doing away with one of the main precautions against anyone's entering their room during the night.

page 343-344:.

Mr. Seawell: Then, sir, without prejudice to our position, and without waving any rights in our motion, I renew the motion to direct. The grounds of it are these:

First, that the alleged servant, Barnes, was an employee of the United States and was not an employee of Dichmann, Wright & Pugh, the defendant here, at the time of the occurrence.

Second, that the evidence fails utterly to show, and in fact shows otherwise, that Barnes was acting within the scope of his employment or authority at the time, and the evidence shows that he was off duty.

Third, that the negligence of the plaintiffs, themselves, operates here, because they disregarded the sign which, it has been testified, was in the stateroom, not to leave the shutter open during the night after they had retired.

Fourth, that there is no contract of carriage here between these plaintiffs and this defendant. The ticket which constitutes the contract of carriage between them has been [fol. 15] introduced in evidence and it reads thus: "Issued by Washington-Hampton Roads Line, operated by United States of America, War Shipping Administration". The only contract of carriage here is with the United States of America, War Shipping Administration. Dichmann, Wright & Pugh, Incorporated, are not parties to the contract, and, therefore, this action is wrongly brought as to Dichmann, Wright & Pugh, Inc., and the plaintiffs have no right of recovery.

DEFENDANT'S MOTIONS FOR MISTRIAL

page 247:

Mr. Hughes: If Your Honor please, we think that this bringing in of the insurance question is prejudicial, and that it is well settled that it is appropriate in such circumstances to make a motion for a mistrial, and we make the motion on that ground.

page 341-342:

Mr. Seawell: First, if Your Honor please, we desire to renew our motion for a mistrial, based upon the fact that our adversaries brought to the notice of the jury, and for the purpose which they frankly told you, the question of coverage by insurance. That is the first motion we have to make. I don't know that there is any further argument that I care to make of it at this time. I think I have said all we have to say on the subject. It does seem to me that when evidence is produced before the jury as explicit-y as this was and with the avowed purpose, as is in the record; of showing to the jury that this defendant would not have to pay any verdict that might be rendered against it, they have violated the very principles that our courts have established and done what they have said is not correct. We think that there should be a mistrial ordered and we very seriously contend for it. That is our first motion, sir.

page 369:

(Preliminary motion to set aside verdict).

[fol. 16] Mr. Seawell: Our motion is to set aside the verdicts as contrary to the law and the evidence.

CHARGE TO THE JURY

page 354 to 364:

The Court: Gentlemen of the jury, it is the function of the Court at this time to charge you with respect to the law applicable to the facts of the case which you are now considering.

Let me say at the beginning that you are the sole judges of the facts. The determination of the true facts and the correct verdict is exclusively within the province of the jury. Nothing which I say or may say is to be considered by you as in any way expressing an opinion concerning the facts of the case. I shall not make any statement which is intended as an expression of any opinion on the part of the Court.

When you retire to your room, your first function will be to select one of your number as a foreman. The foreman votes as any other member of the jury does, and it is his

function to see that each juror has an opportunity to be heard in an orderly manner and to vote, that is, each juror to vote according to his views. The foreman also votes. The foreman signs such verdict or verdicts as may be returned.

Gentlemen, the first question presented in this case concerns the status of the defendant, Dichmann, Wright & Pugh, Incorporated, on the question of liability for any negligence on the part of the officers or crew, or officers or employees of the Steamship Meteor. There has been admitted in evidence a contract between the defendant, Dichmann, Wright & Pugh, and the War Shipping Administration of the United States. That contract which has been referred to was admitted for the purpose of showing the status of the defendant, Dichmann, Wright & Pugh, Incorporated. The contract involves vessels in addition to the Meteor, but you are not concerned with such other vessels. You are told that the Court has interpreted the contract, and I now charge you, as a matter of law, that the defendant, Dichmann, Wright & Pugh, may be responsible for any act of negligence on the part of the steamship per- [fol. 17] sonnel, as that term is defined later. In other words, gentlemen, for the purpose of this case, the defendant, Dichmann, Wright & Pugh, was the principal and the operator of the Steamship Meteor at the time in question.

Certain testimony has referred to provisions of the contract to which I have adverted, relating to liability insurance, or indemnification. Certain other testimony has referred to the earnings of the defendant under this contract. This morning, my attention was called to an article in one of the local newspapers referring to the matter of insurance. Now, gentlemen, the verdict of the jury must be in no way concerned or influenced by any reference to insurance in either the contract or newspaper article, nor by reference to earnings of the defendant under this contract. The jury is required in arriving at a proper verdict to disregard utterly any such testimony or evidence and decide the case, as respects both the question of liability and the question of damages, if damages are awarded, solely upon the facts disclosed by the evidence relating to such negligence or lack of negligence and to such damages, if any, as those terms are later here defined, just as your verdict must not be based upon any sympathy or prejudice.

At this point I shall ask you whether any juror entertains any doubt of his ability to return a verdict utterly and entirely unbiased and free of prejudice as a result of what has developed with relation to either insurance or earnings? If any of you are not satisfied beyond a doubt of your ability to return a verdict in no way influenced by such references, please inform me at this time. If your verdict is in any manner influenced by such references, the parties to this case will not have had a fair and impartial trial, gentlemen, and, above all, that is what a litigant should receive in a court of law. Now, gentlemen, if any of you entertain any slight degree of doubt in your mind concerning prejudice arising as the result of these references, I should like for you to tell me at this time. I take your silence to mean that your answer to the question is in the negative. If I am incorrect, I trust that any of you who feel differently will so inform me.

This matter involves three actions which, for the purpose of trial, have been consolidated by the Court. One of those actions was instituted by Mrs. Lillian A. Weade and her husband, Frederick M. Weade. In that action Mrs. Weade [fol. 18] is asking damages in the sum of \$100,000 for alleged injuries to her head, body and limbs alleged shock to her nervous system which she contends were being permanently affected and impaired, all of which she further contends is the result of an alleged assault and rape upon her by a Negro employee of the defendant.

In this same action Mr. Weade, the husband of Mrs. Weade, is asking damages in the sum of \$50,000 for the loss of services and society of his wife and for expenses and loss of time and earnings which he alleges he has sustained as a result of the alleged attack upon his wife.

Mrs. Roberta L. Stinemeyer is the plaintiff in the other action. I said three actions; there are only two actions, but there are three plaintiffs. Mrs. Stinemeyer is seeking damages in the amount of \$10,000 for an alleged shock to her nervous system caused by reason of Mrs. Stinemeyer's being required to witness in part the alleged assault and rape of Mrs. Weade.

It therefore becomes necessary that you return three separate verdicts in the cases. In the event that you find defendant is not liable, your verdict in each case would be, in substance, "We the jury find for the defendant," signed

by the foreman. In the event you believe by a preponderance of the evidence, as hereinafter defined, that the defendant is liable to any one or more of the plaintiffs, then you may return a verdict in favor of that particular plaintiff or plaintiffs. It is thus possible that you may arrive at the conclusion that one plaintiff is entitled to recover but that another plaintiff has not sustained any loss, damage, or injury. By the same token, it is possible for you to reach the conclusion that all three plaintiffs are entitled to recover, or that two of the plaintiffs are entitled to recover. In any such case where you are of opinion from a preponderance of the evidence that the plaintiff is entitled to recover, your verdict should be, in substance, as follows: "We the jury find for the plaintiff," followed by the name of the particular plaintiff, "against the defendant, and assess damages in the amount of," whatever your verdict may be. In no event may you return a verdict in excess of the amount sued for by each individual plaintiff.

In the event you find for the plaintiff, Mrs. Weade (she is the plaintiff against whom the alleged assault was committed [fol. 19]), in assessing her damages you may consider the following: The physical pain and suffering, if any, sustained by her as a result of the alleged attack; the nature of the crime, if proved, committed against her; the shock, if any, to her nervous system, and whether or not the same has been permanently affected and impaired, if such shock, in your opinion, is the result of the alleged attack; the mental anxiety, if any, sustained by her as a result of the alleged attack; the loss of earnings, past, present, and future, if any, sustained by her as a result of the alleged attack; the embarrassment, past, present, and future, if any, sustained as a result of the alleged attack.

Should you find for Mr. Weade, the husband of Mrs. Weade, in assessing his damages you may consider the following: The value of the loss of what is known as "consortium," if you believe he has sustained such loss, of his wife. Consortium is the services, comfort, fellowship, aid, association, and society of his wife. You may consider that if you believe that he has sustained such loss as a result of the alleged attack. You may consider also the loss of time and earnings, if any, sustained by him as a result of the alleged attack upon his wife.

In the event you find for Mrs. Stinemeyer, in assessing

her damages you may take into consideration the following; The mental anguish, if any, sustained by her as a result of the alleged attack upon Mrs. Weade in her presence; the shock, if any, upon her nervous system (Mrs. Stinemeyer's nervous system, I mean) sustained as a result of the alleged attack in question, and whether or not such shock is temporary or permanent; further, the medical expenses, if any, sustained by Mrs. Stinemeyer as a result of her injury following and caused by the alleged attack upon Mrs. Weade.

Now, gentlemen, in this case as in all civil cases, the burden of proving the case rests upon the plaintiff. That burden is that the plaintiff prove his or her case by a greater weight, or preponderance, of the evidence. In this particular situation there is a duty upon each of these plaintiffs to prove their cases. Of course, the testimony of some witnesses may be considered as proof of all three charges, all three demands, and you are not to count the witnesses as being for this plaintiff or that plaintiff, but the testimony of [fol. 20] the witnesses as a whole. The duty is upon the plaintiff to prove the case by a greater weight, or preponderance, not a greater number of witnesses, but by the greater weight attached to the evidence when considered as a whole. There can be no recovery in any case unless the plaintiff in that case has proved by the greater weight of the evidence that the defendant was guilty of negligence, as later defined in this charge, and that such negligence on the part of the defendant was the proximate cause of the injuries of which complaint is made.

You are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. You may determine from their appearance on the witness stand, their apparent candor and frankness, their manner of testifying, their apparent intelligence or lack of intelligence and from all other circumstances appearing which of them are more worthy of credit, and give credit accordingly.

Under the law of this case, by virtue of the contract which I have referred to, the defendant, Dichmann, Wright & Pugh, is what is known as a common carrier, or engaged in business as a common carrier, perhaps is more correctly the case, and by virtue of having purchased tickets and boarded the Steamship METEOR for the purpose of being transported to Washington, the plaintiffs, Mrs. Weade and

Mrs. Stinemeyer, became and throughout the voyage continued to be what are known as passengers. This is to be borne in mind, because it is important in determining the issues of those two parties. A common carrier, without undertaking to go into an extended discussion of that term, is one engaged in the operation of a business for the carriage of either passengers or goods, or the transportation of passengers or goods. The phase of the business of the defendant with which you are concerned in this case is its occupation as a common carrier engaged in the transportation of passengers for hire, and you are told, gentlemen, that one so engaged is under the duty to exercise the highest degree of care consistent with the nature of his undertaking to safely transport passengers; that is to say, the defendant was bound to use the utmost or highest degree of practicable care and diligence under the circumstances existing which would be used by any cautious person, and the defendant will be held liable for the slightest negligence which human [fol. 21] care, skill, and foresight could have foreseen and guarded against. While the burden of proof is upon the plaintiffs to prove by the preponderance of the evidence that the defendant was negligent, any slight degree of negligence which may be believed by you as the proximate cause of the alleged injuries to Mrs. Weade or to Mrs. Stinemeyer is sufficient to justify a verdict in behalf of the plaintiffs.

This duty to exercise the highest degree of care extends to all acts of the carrier, the defendant in this case, in connection with transporting passengers and includes such provisions as are proper for providing safe accommodations, a suitable number of watchmen in all passenger quarters and on each deck, protection from danger or peril, the selection of competent, careful, and sober employees, and all other details relating to the operation of a common carrier of passengers such as the one here involved.

If upon consideration of the evidence as a whole you reach the conclusion that the injuries referred to were proximately or directly caused by the failure of the defendant acting, of course, through its agents and employees in charge, to exercise that degree of care, then you should find for the plaintiff or plaintiffs, as in your view that evidence may be proper.

What I have said, gentlemen, is qualified by this: that

contributory negligence on the part of the plaintiffs which directly or proximately caused the injuries may constitute a bar to recovery on the part of such plaintiff or plaintiffs as you may believe to have been guilty of such negligence. The plaintiffs were required to take such precautions for their own safety as would have been taken by a reasonably prudent person placed in similar circumstances. They were required to observe reasonable regulations and warnings for their protection. For their negligence, if any, to bar such recovery, it must have been such as directly or proximately caused the injuries.

If you should be of opinion that the failure of the defendants to exercise the highest degree of care, as I have defined it, was the direct or proximate cause of the injuries, then you should find for the *the* plaintiffs. If, upon the other hand, you should believe that the failure of the plaintiffs to take reasonable precautions for their protection resulted in contributory negligence, which contributory negligence [fol. 22] was the direct or proximate cause of the injuries, then you should find for the defendant.

Gentlemen, I shall request that you retire to your room for just a few minutes; then I will call you back directly.

DEFENDANT'S EXCEPTIONS TO THE COURT'S CHARGE TO THE JURY

page 364:

Mr. Seawell: If Your Honor please, on behalf of the defendant in this case we object to the charge of the Court, especially in the following particulars:

The Court erred in charging that the defendant, Dichmann, Wright & Pugh, Incorporated, under the contract between it and the War Shipping Administration, was the employer of the crew, and especially of Jack Lester Barnes, who is alleged to have committed the offense in this case.

Second: The Court erred in charging that the defendant, Dichmann, Wright & Pugh, Incorporated, was a common carrier and, therefore, liable in this for all of the requirements incident to the duty of a common carrier.

page 365:

Fourth: The Court erred in its charge with reference to the question of insurance being placed before the jury by

attorneys for the plaintiff, and that the charge by this Court this afternoon, the day after the offer of the evidence on the question of insurance, does not relieve the situation. Defendant contends that a mistrial should have been awarded promptly upon the introduction of the evidence, especially for the purpose as stated in the record by attorneys for the plaintiff.

DEFENDANT'S REQUEST FOR INSTRUCTIONS WHICH WERE REFUSED

page 364:

By Mr. Seawell: Third, The Court erred in failing to charge that under the contract between Dichmann, Wright [fol. 23] & Pugh, Incorporated, and the War Shipping Administration the Steamer METEOR was being operated by the United States of America, War Shipping Administration, under the title of Washington-Hampton Roads Line and that the United States of America, and not Dichmann, Wright & Pugh, Incorporated, was the employer of the man Barnes, for whose act, if guilty, it alone was responsible, and not Dichmann, Wright & Pugh, Incorporated.

page 365:

Fifth, The Court erred in failing to charge, as requested by defendant, that in order for the defendant in any event to be held liable, the employee, Barnes, at the time of committing the act, must have been acting at the time within the scope of his employment and in the line of his duty.

Sixth, The Court failed to charge, as requested by the defendant, that there was no contract of carriage between the plaintiffs, Mrs. Weade and Mrs. Stinemeyer, and this defendant, but that the evidence as shown by the tickets introduced in evidence was to the effect that the contract of carriage was between plaintiffs and the Washington-Hampton Roads Line, operated by the United States of America-War Shipping Administration.

Seventh, The Court failed to charge, as requested by this defendant, that the plaintiff, Frederick M. Weade, is not entitled to recover any damages in this action, by virtue of the provisions of the Statutes of Virginia, Section 5134, which denies such action to the husband of the plaintiff.

Eight-, For its failure to charge, as requested by this *this* defendant, that the plaintiff, Mrs. Stinemeyer, is not entitled to recover any damages, there having been no attack upon her, and the only claim upon her behalf being that she partially witnessed the occurrence.

Ninth, That in the charge upon the question of contributory negligence there should have been added to the words, that the plaintiffs' negligence proximately or directly caused the occur-ance, the words "or contributed thereto."

[fols. 24-26] page 369:

Mr. Seawell: If Your Honor please, we desire to move to set aside these verdicts and, first, to enter judgment in favor of the defendant in each one, or, in the absence of that, to grant a new trial, upon the ground that the court erred in its charge to the jury and that the jury erred in its interpretation; and, also, we wish to renew at this time our motion, which your Honor has not passed upon as yet, for a directed verdict, and also call to the Court's attention the fact that we still feel that a mistrial should have been granted at the time of the introduction of the evidence concerning insurance. We feel that the amount of the verdict, both for Mrs. Stinemeyer and Mrs. Weade, shows conclusively that the amount was greatly exaggerated, and one of our grounds for this motion is excessiveness of the amount, and that these excessive amounts reflect the question of insurance of which I spoke at the time of my argument.

DEFENDANT'S MOTION TO SET ASIDE THE VERDICTS AND ENTER
JUDGMENTS FOR DEFENDANT, OR GRANT A NEW TRIAL

Page 369-370:

Mr. Seawell: If Your Honor please, we desire to move to set aside these verdicts and, first, to enter judgement in favor of the defendant in each one, or in the absence of that, to grant a new trial, upon the ground that the Court erred in its charge to the jury and that the jury erred in its interpretation; and, also we wish to renew at this time our motion, which your Honor has not passed upon as yet, for a directed verdict, and also call to the Court's attention the fact that we still feel that a mistrial should have been granted at the time of the introduction of the evidence concerning insurance. We feel that the amount of the verdict,

both for Mrs. Stinemeyer and Mrs. Weade, shows conclusively that the amount was greatly exaggerated, and one of our grounds for this motion is excessiveness of the amount, and that these excessive amounts reflect the question of insurance of which I spoke at the time of my argument.

[fol. 27]

DEFENDANT'S EXHIBIT 1

Issued by

Washington-Hampton Roads Line

Operated by United States of America, War Shipping
Administration

One First Class Passage

Norfolk, or Old Point Comfort Va. to Washington, D. C.

Subject to the Following contract:

This ticket is void unless officially stamped and dated.

Baggage valuation is limited to \$100 for and adult and \$50 for a child, unless purchaser hereof declares a greater valuation at time baggage is presented for transportation and pays excess valuation charges according to tariff rates, rules and regulations.

The company will under no circumstances be responsible for any moneys or valuables unless deposited with the Purser on Steamer, nor will they be responsible for any baggage unless properly checked.

This ticket is limited for passage within thirty days from date of sale stamped on back.

Dichmann, Wright & Pugh, Inc., Agent. I. S. Walker,
Gen. Passenger Agent.

5138

Form WH-1

Stamped on face: W. & H. R. Line. Aug. 3, 1945, Steamer Meteor.

Stamped on back: Joint Ticket Office, Jul. 25, '45. Old Point Comfort, Va.

5001-40000 6-28-45

[fol. 28]

DEFENDANT'S EXHIBIT 2

Form WH-15. S. R. 2

Washington-Hampton Roads Line

Operated by United States of America, War Shipping
Administration

\$2.00 Stateroom Card

This Stateroom Card Not Redeemable Unless Reservation
Cancelled Before Noon of Date of Sailing
Name Mrs. F. M. Weade

Steamer Meteor

Date 8/3/45

Ticket 5138 Room No. 116

Form No. WH-1

Dichmann, Wright & Pugh, Inc., Agent. I. S. Walker,
Genl. Passenger Agent.

49

Stamped on back: Joint Ticket Office. Jul. 25, '45. Old
Point Comfort, Va.

[fol. 29]. JUDGE'S CHAMBERS, UNITED STATES DISTRICT COURT,
NORFOLK, VA.

June 3, 1947

Messrs. Breeden and Hoffman
Attorneys at Law
National Bank of Commerce Building
Norfolk, Virginia

Messrs. Hughes, Little and Seawell
Attorneys at Law
Wainwright Building
Norfolk, Virginia

Gentlemen:

Re: Lillian A. Weade, et al

v.

Dichman, Wright and Pugh, Inc., et al-
Civil Action No. 617;

Roberts L. Stinemeyer

v.

Dichman, Wright and Pugh, Inc., et al-
Civil Action No. 616-

OPINION OF COURT

Upon consideration of the above cases I am of the opinion that the verdicts of the jury should not be set aside.

While the case of *Hust v. Moore-McCormick Lines, Incorporated*, 328 U. S., 707, is not precisely in point, it is my view that it is controlling so far as the liability of the defendant is concerned.

The question concerning the right of Mrs. Stinemeyer to recover, I believe should be resolved in favor of the plaintiff under the authorities cited and the same observation applies with respect to Mr. Weade.

The question pertaining to the amount of the verdict is one which has given me some concern, but upon consideration of all the facts involved, I can not say that the verdict in either instance is excessive. I have no doubt in my mind concerning the proof of negligence.

Nor do I believe reference to insurance was prejudicial. [fol. 30] It is my view that the contract, in its entirety, was properly admissible.

I had hoped to be able to write a more comprehensive memorandum but my engagements are such that I am unable to so do without delaying the decision longer than I feel would be justified.

It is suggested that counsel for the plaintiffs prepare and submit to counsel for the defendant draft of an order overruling the pending motion and entering judgment in accordance with the views here expressed.

Very truly yours, Sterling Hutcheson, United States District Judge.

JUDGE'S CHAMBERS, UNITED STATES DISTRICT COURT,
RICHMOND, VA.

July 28, 1947.

Messrs. Breeden and Hoffman
Attorneys at Law
National Bank of Commerce Building
Norfolk, Virginia

Messrs. Hughes, Little and Seawell
Attorneys at Law
Wainwright Building
Norfolk, Virginia

Gentlemen:

Re: Lillian A. Weade, et al

v.

Dichman, Wright and Pugh, Incorporated, et al
Norfolk Civil Action No. 617-

Roberta L. Stinemeyer

v.

Dichman, Wright and Pugh, Incorporated, et al
Norfolk Civil Action No. 616-

OPINION OF COURT

[fol. 31] Receipt is acknowledged of letter from Messrs. Hughes, Little and Seawell of July-17 and Messrs. Breeden

and Hoffman of July 23, 1947, relative to the above captioned cases, written pursuant to request contained in my letter that counsel submit their views with respect to the effect upon this case of the decision in the case of *Caldarola v. Eckert*, decided June 23, 1947.

I have also examined the opinion in the *Caldarola* case.

It is my conclusion that the questions involved in the cases under consideration are not governed by the decision in the *Caldarola* case. Without undertaking an extended discussion of the distinction between these cases and that one, attention is invited to the fact that in the *Caldarola* case the Government bore the responsibility of furnishing and maintaining in good working order all necessary equipment. The plaintiff, an employee of one under a contract with the United States, was injured by defective equipment.

In the instant cases the injuries were sustained as a result of negligence and misconduct on the part of those employed by the agent.

Upon a consideration of the entire record, including what is considered pertinent portions of the contract, I am of opinion that the several motions to set aside the verdicts should be overruled and judgements entered for the plaintiffs.

In accordance with the conclusions here expressed, I am today entering order heretofore presented and referred to in letter from Mr. Breeden of June 30 and letter from Mr. Seawell of June 28.

Very truly yours, Sterling Hutcheson, United States
District Judge.

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 617

Lillian A. Weade and Frederick M. Weade, Plaintiffs

Dichmann, Wright & Pugh, Inc., a Delaware corporation
Defendant

and

Civil Action No. 616

Roberta L. Stinemeyer, Plaintiff,

v.

Dichmann, Wright & Pugh, Inc., a Delaware Corporation,
Defendant

ORDER AND JUDGMENT—July 28, 1947

The above styled civil actions, heretofore consolidated for the purpose of trial and in which a jury trial was heretofore jointly had, came on this day to be further heard on the motions of counsel for the defendant heretofore made upon grounds fully stated in the record to (1) declare a mistrial and/or (2) to dismiss said actions and/or (3) to set aside said verdicts as excessive and/or (4) to set aside the said verdicts and grant a new trial.

And the Court having fully heard and maturely considered the proceedings herein and the arguments of counsel, is of opinion that said motions should be overruled.

The Court doth therefore order:

1. That the Defendant's motion for a mistrial be and the same is hereby denied and overruled.
2. That the Defendant, Dichmann, Wright & Pugh, Inc., is the proper party defendant in each of these actions [fols. 33-37] and its motion to dismiss be and the same is hereby overruled.
3. That the amount of the verdict in each said action is not excessive; Defendant's motion for a new trial on the grounds that said verdicts are excessive is overruled.

4. That the Defendant's motion to set aside the verdicts and grant a new trial, be and the same is hereby overruled.

Whereupon it is ordered by the Court that Lillian A. Weade recover against Dichmann, Wright & Pugh, Incorporated, the sum of Fifty Thousand Dollars (\$50,000.00), with interest thereon from March 27, 1947, until paid, together with her costs herein expended.

It is further ordered by the Court that Frederick M. Weade recover against Dichmann, Wright & Pugh, Incorporated, the sum of One Thousand Dollars (\$1,000.00), with interest thereon from March 27, 1947, until paid, together with his costs herein expended.

And it is further ordered by the Court that Roberta L. Stinemeyer recover against Dichmann, Wright & Pugh, Incorporated, the sum of Five Thousand Dollars (\$5,000.00), with interest thereon from March 27, 1947, until paid, together with her costs herein expended.

To which rulings and judgments the Defendant, by counsel, duly excepted.

— — —, United States District Judge.

Norfolk, Virginia, July 28, 1947.

[fols. 38-45] S. BOWEN DORSEY, called as a witness by and on behalf of the plaintiffs, having been duly sworn, testified as follows:

• Examined by Mr. Hoffman:

page 97,
l. 7-9:

Q. What is your occupation, Mr. Dorsey?

A. Director of the Bureau of Identification at the Prison Department of North Carolina.

page 100,
l. 23-24:

Q. And, "Arrested or received, Sept. 3, 1941—C. C. W."; what does that mean?

A. "Carrying concealed weapon."

page 101,
l. 1-2:

Q. And what was the other charge?

A. Violating the probation law.

page 102,
lines 1-7:

Q. And on the second page appear these words:

"Admits: 1939, fighting; Wilson, N. C.; paid \$12 fine.

Admits: 1940, fighting, Burgaw, N. C.; served 4 mos..15 da. of 1 yr.

"Admits: 1942, fighting, Jacksonville, N. C.; paid \$22 fine".

Is that the record of the said Jack Lester Barnes?

A. Yes, sir.

[fol. 46] GEORGE C. HUDGINS, called as a witness by the plaintiffs, having been duly sworn, testified as follows:

Examined by Mr. Hoffman:

page 149
line 17-25

Q. On August 3, 1945, and on August 4, 1945, during the early morning, you were captain of the S. S. METEOR, were you not?

A. Yes, sir.

Q. Captain, at three o'clock on that particular morning of August 4, where was the S. S. METEOR?

A. Just below—off Cedar Point in the Potomac River.

Q. Is that in the territory of the waters of the State of Maryland?

page 150 to
line 22:

A. Yes, sir.

Q. And one Jack Lester Barnes, the Negro who has been referred to in this trial, was a member of that ship's crew on that particular morning, was he not?

A. Yes, sir.

Q. Did you employ him?

A. He was employed by the steward of the ship at that time.

Q. Who was the steward?

A. A man by the name of Bell.

Q. The duties of Jack Lester Barnes were in the galley of that ship, were they not?

A. Yes, sir.

Q. You never at any time told Jack Lester Barnes that he should not travel into any other portion of the ship, did you?

A. Well, that was standing rules, that they were to keep away from——

Q. That is not my question.

A. Well, I hadn't told him in person. I don't recall of telling him in person that he was not to go into certain places.

[fol. 47] G. C. HUDGINS recalled by and on behalf of the defendant, further testified as follows:

Examined by Mr. Hughes:

page 273:

line 13-25:

Q. You are Captain G. C. Hudgins?

A. Correct.

Q. And your age, captain?

A. Fifty-three.

Q. Where is your residence?

A. Mathews, Virginia.

Q. How long have you been following the sea?

A. Thirty years.

Q. What kinds of experience have you had following the sea?

A. Well, I had—I started at the bottom as seaman and have gone through and I have had about 20 years as master, four years as pilot and port captain.

pages 274 to

301, line 22:

Q. What connection did you have with the operation of the METEOR between Washington and Norfolk?

A. I was master of her.

Q. During the entire operation?

A. No, sir.

Q. What portion of it?

A. I was master of her from the time we went on the run until the 5th of August, if I remember correctly; the 5th or 6th; I won't say the exact date now.

Q. Then, you were master at the time of the incident involved in this case?

A. I was.

Q. What have you done since that time?

A. Well, I was taken off of there then as port captain; remained port captain for some time, and then was put back as master of one of the ships.

Q. Did you give us the information upon which was based the answer to the interrogatory about the crew required aboard the METEOR?

[fol. 48] A. I did.

Q. Do you know what crew she actually had? You gave us that information too, did you, or did we get that from some other source?

A. No; that was given to you from the office.

Q. Do you know what crew she actually had?

A. Well, I can't say right now to the exact number.

Q. Well, tell us what employees served in taking care of the deck spaces and the staterooms?

A. Well, in reference to the staterooms and the portion of the vessel that was designated for the passengers, that was taken care of by the steward and his crew under him, under his supervision, and the purser.

Q. And who?

A. The purser.

Q. Were there any watchmen employed?

A. That's right; we had two saloon watchmen and one deck watchman.

Q. And what were the duties of those employees?

A. The saloon watchman was to patrol the saloon at regular intervals during the night. The deck watchman was stationed on the freight deck, making hourly rounds on all decks.

Q. How many were on duty at a time.

A. There was—you mean of the ones I mentioned, or the entire crew?

Q. No, the ones you have mentioned—the watchmen.

A. Well, all three of those watchmen were on duty.

Q. Now, tell me where stateroom 116 is located on the METEOR?

A. On the starboard side of the vessel.

Q. What deck?

A. Galley deck, or boat deck.

Q. What is immediately forward and what is immediately aft of that room?

A. Staterooms.

Q. What is the number of the one forward of it?

A. The one next to that is 114.

Q. And what is next to that, still farther forward?

A. Well, starting from 116 going forward is 114, 112, 110, 108 and then a mate's room.

Q. And then forward of the mate's room.

[fol. 49] A. Is another room.

Q. And then forward of that?

A. The galley.

Q. So that in the reverse order we have the galley, the two mate's rooms, and then the staterooms beginning on that side with the even numbers 102—

A. No; 108 starts with the mate's room.

Q. 108, 110, 112, 114, and 116, and then farther aft of 116 the even numbers continue, 118, and so forth?

A. That's right.

Q. There has been a good deal of testimony and discussion since the occurrence involved in this case, about insect screens in the staterooms. Were there any insect screens in the staterooms on the vessel?

A. No, sir.

Q. Where were the insect screens, if any?

A. In the galley and the mess rooms.

Q. What was the bell-call arrangement in room 116?

A. It was a push button on the inward bulkhead of the partition about halfway between the two berths, in reaching distance of either berth, or each berth, I should say.

Q. When you say "the bulkhead" you refer to the partition between the stateroom and the gallery outside of the stateroom? Is that the partition—

A. No, sir. I mean the partition in between the stateroom and the gallery.

Q. The gallery?

A. That is right; the inside partition between the state-room and the gallery.

Q. And what was this deck called?

A. Some call it the gallery deck, or the boat deck. It is really the boat deck, because it is the deck the boats are on.

Q. Do you know when Jack Barnes was employed—when his service on the vessel began?

A. If I remember correctly, it was around the first of July; about the 8th, I think, or thereabouts.

Q. Had you had any opportunity to observe him?

A. Yes, not prior to his employment, but afterwards.

Q. I mean after his employment.

A. That's right, yes.

Q. What opportunity did you have to observe him, and what was your observation of him?

[fol. 50] A. Well, my opportunity of observing him was in making my inspections of the galley, and so forth, where he worked, going through and making my regular inspections in the galley where he worked, and I had seen him around the deck.

Q. Had there ever been any difficulty with him, or any misconduct on his part, as far as you know?

A. No, not before this time.

Q. What were his hours of duty?

A. From around 6 o'clock in the morning until 9 p.m.

Q. And what was his place of duty?

A. In the galley.

Q. Did he have any connection whatever with any of the staterooms in connection with his duty.

A. No, sir.

Q. What were the employment conditions at the time that this cook was employed?

A. Well, it was very difficult in getting men at that time.

Mr. Hoffman: Our objection goes to the same line, if your Honor please, as to Mr. Smith's testimony.

Mr. Hughes:

Q. Was the turn-over frequent or infrequent?

A. Frequent.

Q. Can you give us a little more detail as to that—how frequent?

A. Well, for one thing, there was quite a demand for

men in the different branches. Lots of times the men would be taken off the ships by the Government to be put elsewhere and there was a very frequent change in the crew, for different reasons.

Q. Well, speaking of it with reference to voyages or trips, would it be every trip, or every fifth trip or every tenth trip, or how often?

A. Well, sometimes we would have a change in crew every trip; there would be one or two, sometimes more; that is a round trip, I mean.

Q. Was it difficult or easy to get new men?

A. Well, it was difficult.

Q. Why?

[fol. 51] A. Well, on account of having such a demand for men.

Q. Were there inexperienced men in the Merchant Marine, and was there a demand?

A. Well, we were in a war.

Q. All right, sir; that is what I wanted you to say.

Now, I have asked you about the call bell in the state-room. Was the call-bell in that particular stateroom in order?

A. To the best of my knowledge, it was, sir.

Q. Where did it ring?

A. The bell rang out in the saloon, where either a maid or a bellhop was stationed nearby.

Q. Were there any signs of any sort posted in the rooms?

A. Yes; there was a sign in regards to keeping the shutters closed, and so forth, at night.

Q. What did that sign say?

Mr. Hoffman: If Your Honor please, I think the sign should be produced as the best evidence.

The Court: The witness will certainly have to testify first that it was there.

Mr. Hoffman: Well, he said it was there.

The Court: Have you a copy of it?

Mr. Hughes: No, sir, we have no copy of it.

The Court: The objection is overruled.

Mr. Hoffman: We except.

Mr. Hughes:

Q. What was the sign about keeping the windows closed?

A. Well, the best I can remember, the wording of the

sign was a warning to the passengers to keep the shutter closed, or the window, at all times at night after retiring.

Q. What was your first knowledge of the occurrence in room 116 which is involved in this case?

A. About 3:45 the same morning.

Q. Tell us just what happened, how you learned it, and what you did.

[fol. 52] A. I was awakened by the Shore Patrol, accompanied by the saloon watchman, who went with the saloon watchman.

Q. Tell us about the Shore Patrol.

A. There was a Shore Patrol that traveled with the vessel each trip.

Q. Members of the Navy?

A. Yes, sir.

Q. All right.

A. I was awakened by one of those, accompanied by the saloon watchman, the best I recollect, who informed me that a colored man—I don't recall whether he said that, but that a lady had been attacked in room 116. That is, to the best of my recollection, the words they said to me.

Q. What did you do?

A. I immediately got up and dressed and went to the room to try to find out just what had happened.

Q. What did you do then?

A. After being given a description, mostly by Mrs. Stinemeyer, of the man as she saw him, I went on a search for the man.

Q. And you found the man that seemed to you to correspond to that description?

A. I did.

Q. And you brought him up for identification?

A. I did.

Q. When was the last time that you have seen the Meteor?

A. I saw the Meteor Friday before last.

Q. Where was she then?

A. In the James River.

Q. What did you do then? What observations did you make?

A. I surveyed the staterooms. You asked the observations; you did not ask what I did; you asked me what I observed?

Q. Yes.

A. I observed that the windows were the same as I have described before—that the screens were still there in the galley and the messrooms; there were still no screens in any of the staterooms.

[fol. 53] Q. Was there any place for an insect screen in the stateroom?

A. No, there was no slot, as you might call it, or groove, or place in there for a screen.

Q. At the time of the occur-ence involved in this suit, between 3 and 3.30 a. m. was Barnes on duty?

A. No, sir.

Mr. Hoffman: If your Honor please, I think that is a legal conclusion. That is for Your Honor to decide.

The Court: I think you might be a little more specific, Mr. Hughes.

Mr. Hoffman: He was not cooking, but the question is whether he was on duty. We admit he was not cooking.

By Mr. Hughes:

Q. Was there any duty for him to perform at that time, either where the occur-ance took place or anywhere?

A. No.

Q. Where was his place aboard the vessel when on duty and when not on duty?

A. Well, when on duty in the galley; when not on duty he was allowed down in the crew's quarters; in the steward's department, in other words.

Q. Was he allowed on deck.

A. On the main deck? They were allowed to sit out on the main deck.

Cross-examination:

By Mr. Hoffman:

Q. Captain Hudgins, I understood that you left the Meteor as its captain on August 5, 1945; that is the day after this occurred?

A. Well, thereabouts. I don't recall the exact date. It was a day or two after that.

Q. A day or two after this incident occurred, you were no longer captain of the Meteor?

A. That is right.

[fol. 54] Q. How many times have you been on the Meteor for the purpose of inspecting it since that time, up until about ten days ago?

A. Well, I made frequent visits aboard her from the time I was aboard her as captain.

Q. For the purpose of inspecting?

A. Well, for inspecting, and also for the company's business, going down not only inspecting the vessel, but looking for crew, and so forth—the usual port captain's work.

Q. You were so uncertain that, ten days ago, you had to go back there to make sure there were no screens on the vessel; is that right?

A. Well, I went up there just to look her over in general.

Q. Well, you said you made a survey ten days ago and, as a result of your survey, you said, there were no screens?

A. That's right.

Q. At whose request did you go up there?

A. Mr. Hughes'.

Q. And that was what your survey revealed to you, that there were no screens?

A. Well, you asked the question, what it revealed to me, The vessel——

Q. Captain, you said——

Mr. Hughes: Let him finish his answer.

Mr. Hoffman: I beg your pardon.

A. You asked me if that was the only thing that was revealed to me. I just looked the ship over in general. A part of it was curiosity of mine after being on her.

By Mr. Hoffman:

Q. But you went up there only because you were going to testify in this case; isn't that correct, sir?

A. That's right.

Q. Now, who were the watchmen on duty at 3 a. m. on the morning of Aug. 4, 1945?

A. The deck watchman——

Q. I want names. Are they in the courtroom? One of them is, I know, but who else?

[fol. 55] A. There was Adkinson——

Q. This Mr. Adkins—he is in the courtroom?

A. That's right; and Sharlash was the other saloon

watchman's name. The deck watchman's name I don't recall. I think it is here, but I can't recall it myself. I think his name—no, I won't say because I don't recall it at the time.

Q. Is Mr. Sharlash here?

A. No.

Q. Is this deck watchman here?

A. I don't see him.

Q. What was the watchman on the boat deck, or gallery deck?

A. Adkinson was on in the saloon, inside, at that time.

Q. Now, Captain, the gallery or boat deck is the top passenger deck; below that is the saloon deck?

A. That's right.

Q. It is also a passenger deck?

A. That's right.

Q. And below that is the freight deck?

A. That's right.

Q. And you say Mr. Adkins was the deck watchman at that time?

A. No, sir—saloon watchman.

Q. All right. Who was the gallery deck or boat deck watchman?

A. Well, in this ship the saloon watchman can watch practically both saloons—the gallery, you see. In other words, he can stand down on the saloon deck in the saloon and look right around and see the whole deck up there.

Q. So actually, then, Mr. Adkins was the man who was the watchman for the boat deck or gallery deck at that time?

A. Well, the deck watchman makes his usual rounds of all decks.

Q. Yes, but he is a fire patrolman, isn't he?

A. Well, more or less, in a way, and also in watching, and as far as anything going on unusual aboard the vessel that he might determine.

Q. How many fire partolmen did you have on board that ship?

A. Only one.

Q. Was that the deck foreman?

[Vol. 56] A. That was the deck foreman.

Q. They are both one and the same man?

A. That's right.

Q. So that you had two saloon watchmen and one combination deck watchman and fire clock puncher?

A. Right.

Q. You, of course, are familiar with the regulations of the United States Coast Guard with reference to the operation of that vessel, I am sure, are you not, Captain?

A. I think so.

Q. Under section 96.23 I want to read you this language:

"Cabin watchman and fire patrolmen. Vessels carrying passengers shall during the night time keep a suitable number of watchmen in all patrol quarters and on each deck".

How do you interpret the word "each" in the English language, Captain?

A. "Each". Each of the decks.

Q. And the boat deck or gallery deck is up here, and you say that Mr. Adkins was not up there, and he is saloon deck man.

A. Well, he was—at this particular time, I thought you were drawing out just where Adkins was. Now, those two men——

Q. No, because you don't know where he was. He will tell us where he was.

A. Well, those two men took care of the decks. They may alternate, but——

Q. But there are three decks, captain?

A. That's right.

Q. And you had two men taking care of that?

A. We had three men.

Q. All right, sir, but you just said that there were two saloon watchmen?

A. Yes.

Q. And Adkins was the one who took care of that upper deck?

A. No, I say that one man could see up there. I didn't say he was taking care of the two decks alone.

Q. Well, he was taking care of the upper deck, then?

[fol. 57] A. That was up to those two men. They were on duty and, also as I say, the deck watchman made his regular rounds on there. After he made his regular rounds, he went back to the main deck. Now, in addition to those

watchmen, we had lookoutmen, who relieved them on duty at times, and they made—of course, they were not required to punch any clock, as far as that part is concerned.

Q. How often did the watchmen report to you?

A. They reported to the bridge hourly.

Q. Now, you said that one of these watchmen was a fire patrolman; is that correct?

A. Well, that is what they term it, in a way. He punched the clock regularly.

Q. You are familiar with the regulation with reference to fire patrolmen, are you not?

A. Well, I don't know as I can recall them by word right at the present time.

Q. Well, I just happen to see it says here that "A fire patrolman while on duty shall have no other task assigned to him." So he could not very well be a watchman and a fire patrolman, under the law, could he Captain?

A. Well, that was—according to what was required on the certificate of that vessel, he patrolled the vessel, watching for fires. You say he could not watch for anything else—

Q. But he has no other duty? You certainly did not assign him to any other duty than just patrolling for fires, did you?

A. Well, he certainly was not instructed not to report anything else. If he saw anything else, he was to report it.

Q. Certainly, any member of your crew who saw anything out of line would be expected to report it, would he not?

A. That's right.

Q. That is a duty that you instructed them in? If they saw anything at all wrong, you instructed them to report it?

A. Yes.

Q. That would be true, whether they were on duty at the particular time, or performing their particular duty assigned to them, or not, wouldn't it?

A. I don't understand it.

Q. You go off duty when you go to sleep, don't you?

A. The master is never off duty.

[fol. 58] Q. Well, you have a first mate who gets off duty. Not while he is asleep, but while he is off duty, if he finds anything wrong he would be bound to report it to the master?

A. Yes, sir.

Q. You had a quartermaster on the boat by the name of Robert H. Miller, didn't you?

A. I think so, at that time, yes.

Q. You remember the man in question?

A. I think so.

Q. He is not here today, is he?

A. I don't see him.

Q. You would know him if you saw him?

A. I think I would, sir.

Q. And you remember that Quartermaster Miller, in reporting this incident to you, told you something about having seen this man Barnes prior to the incident in question?

A. He reported seeing him when he went in the galley for coffee. He reported seeing him in the galley. That was reported to me after the incident.

Q. I understand, but Quartermaster Miller reported to you afterwards that he had seen and talked with this man in the galley?

A. Yes, he made the statement afterwards that he had seen Barnes in the galley and talked with him.

Q. And that was about 2:30 in the morning, wasn't it?

A. Thereabouts.

Q. And he also told you that Barnes had been drinking, didn't he?

A. If I recall, he did, or appeared to be drinking.

Q. Now, certainly, it is not permissible for any member of the crew to ever take a drink while on duty, or off duty, on that boat while transporting passengers, is it?

A. That's right.

Q. So if Quartermaster Miller saw that Barnes had been drinking, then it became his duty, from what you say, that any man that sees anything out of order should report it to you? That became the duty of the quartermaster to report that fact to you, that this man Barnes had violated the duties imposed upon him by drinking; isn't that correct?

A. Well, that is correct, but perhaps—

Q. He didn't do it, did he—

[fol. 59] Mr. Seawell: One minute. Let him finish.

By Mr. Hoffman:

Q. Go ahead.

A. Perhaps the man was not drinking to the extent that he thought he was intoxicated that he would do anything wrong, and he didn't come and call me at that time and tell me so, but he reported it to me afterwards.

Q. Yes, I understand that, but he knew that at 2:30 in the morning?

A. That is what he said.

Q. And if he knew it, then it was his duty to report that to you, wasn't it, because that man violated the law by drinking on board the ship?

A. Well, he violated the rules of the company, but I assume that Miller didn't think the man was intoxicated enough to go in a room, and he didn't bother in waking the master at that hour of the morning to tell me this man—as I recall, this man was not intoxicated at that time enough to justify him or cause him to think he was going to do any violation.

Q. Now Captain, you tell the jury when a man is intoxicated and when he is not.

A. Well, there are several stages of intoxication. A man can be slightly intoxicated or he can be wholly drunk.

Q. And you have heard of men being intoxicated and having imbibed so much of liquor that it affects their sexual desires, haven't you?

A. I have heard that.

Q. Now, you had a negro girl employee on that boat by the name of Betty Jean Parson, didn't you?

A. I think we had one by that name.

The Court: Mr. Hoffman, if you are going into another line of inquiry, we may as well adjourn for lunch. It is one o'clock.

Gentlemen of the jury, I remind you of my admonition on yesterday against discussing this case with anyone or permitting anyone to discuss it in your presence or hearing.

The Court will not recess until 2:15. (Thereupon a recess was taken until 2:15 p. m.)

[fol. 60]

AFTERNOON SESSION

The Court reconvened at 2:15 PM.

G. C. HUDGINS, the witness on the stand at recess, resumed the stand.

By Mr. Hoffman: —

Q. Captain, on the night of this incident it was a very hot and humid night, was it not?

A. It was very hot.

Q. Have you any idea what the temperature was?

A. Well not exactly. I would say around, probably 90 inside the closed rooms.

Q. Just what is the ventilation system on the Meteor for the convenience of passengers to assist them in sleeping?

A. Well, there is different type rooms.

Q. Well, 116?

A. Well, 116 has the shutter and then it has a ventilator around the top—I don't mean overhead, but under the ceiling—has a lattice work around there that gives ventilation.

Q. And there is no electric fan, I take it?

A. There were no electric fans in any of those state-rooms. We could not get electric fans at that time.

Q. And it is true that a lot of people left their doors open that night, isn't it?

A. That's right; at least some. I didn't see many myself, but I was told. I personally did not see many of them open.

Q. When you went to sleep, was your window open?

A. My window open?

Q. Yes.

A. My window was open, but I think I had my shutter closed. I don't recall exactly about the shutter, but my window was open, yes.

Q. You are not sure about the shutter?

A. I think the shutter was closed; at least, the shutter alongside of my berth was closed, yes.

Q. That shutter does not work like a venetian blind, such as in this courtroom? You can't regulate it and have the air, if there is any, come in directly?

A. No, they are permanent shutters. The slats don't work up and down.

[fol. 61] Q. You were asleep at the time this incident occurred?

A. I was.

Q. Who was the officer in charge of the boat at the time you were asleep? Of course, I understand the master is always in charge, but you must have someone in charge while you are asleep.

A. A man by the name of Goode, who was the chief officer, was in charge of the piloting of the vessel at that time.

Q. Is he with us today?

A. No, sir.

Q. Now, Captain Hudgins, do you know whether or not Mr. Miller, the quartermaster, reported the matter of this man's drinking to Captain Goode before the incident?

A. I don't know.

Q. Did you question Captain Goode with regard to that?

A. I don't recall now.

Q. Now, you also had a young colored girl by the name of Betty Jean Parson employed on the boat?

A. I think so.

Q. What was her duty?

A. She was a maid.

Q. And the maid assisted in cleaning up the rooms, is that the situation?

A. That's right.

Q. How old was that girl? Do you know?

A. I don't recall her age. The best I remember, she looked to be around in her twenties—22—I don't recall exact.

Q. And you interviewed that girl after this incident, or at least you were present when she was interviewed, were you not?

A. Yes, sir, part of the time.

Q. And you recall that she told the story that she and this boy Barnes had sat out on the deck from about 9:30 or 10 o'clock until about 2 o'clock in the morning; isn't that correct?

Mr. Seawell: If your Honor please, what conversation had taken place between Captain Hudgins and some other witness is strictly hearsay. Not only that, but it is immaterial to the issue in this case, and we object to it.

[fol. 62] The Court: Mr. Hoffman, it strikes me that would be hearsay, would it not?

By Mr. Hoffman:

Q. Was such a report given to you as master of the vessel?

A. Mr. Seawell: I object, if your Honor please. He asked him if he had any conversation with her. Now he asks, was such a report made to him. That, too, is not admissible here as a fact. It is something to be proved by a witness, but not a communication between one man on the vessel and another.

Mr. Hoffman: I withdraw the question.

By Mr. Hoffman:

Q. Captain Hudgins, is Betty Jean Parson here today?

A. I don't see her.

Q. You also had a young man on the vessel by the name of Culpepper?

A. That's right.

Q. And he was in the galley, was he not, at approximately 2 to 2:30 a.m. on the morning in question?

A. Yes, sir, that was his duties, in the galley.

Q. And is he here today?

A. I don't see him. I don't recollect his favor much.

Q. You said you did not know the name of this deck watchman. Can you tell me where I can find out his name, if you don't know it?

A. Yes, sir. The records are in our office of this man's name, but I can't recall it now.

Q. Does Mr. Smith know it, do you know?

A. I don't know that he knows it.

Q. You said that that deck watchman, whoever he is, is not here?

A. I don't recall. As I say, it is hard for the master to remember all of his crew, but I don't see anyone right here that looks like him. Still, I am not going to say he is not here, because I don't remember his favor that well.

Q. How many staterooms were there on the Meteor for occupancy by passengers? We have called upon opposing counsel for a floor plan and it is not available, but you made [fol. 63] a survey out there ten days ago, so I assume that

you can tell us how many staterooms there are for passengers.

A. Roughly, about 150.

Q. And they are designed to be occupied by approximately two to each stateroom?

A. Yes, sir.

Q. So that you had approximately 300 passengers on the boat that night?

A. Yes, sir.

Q. Who was the person designated to answer the call bell at 3 A.M. on the morning in question?

A. It was either a maid or a bellhop; I can't recall the the name of the one that did that work—alternated in that work, one assigned one night—at least, not one to the night, but there would be several on at night, but they would be assigned to different hours. I don't recall who was assigned to that particular time.

Q. Is the person who was assigned to that particular time available in court today?

A. I don't see anyone. They were both colored. I don't see anyone here that looks like them. The maids and the bellhops both were colored.

Q. The shore patrolmen that were on duty were asleep at the time this occurred; isn't that correct? That is, they were on the boat?

A. I don't know that they were asleep. I understand they were in their quarters, at least one of them. I can't say that they were asleep.

Q. In their quarters?

A. I think so—one out.

Q. And where was Mr. Shirlash?

A. My understand, he had gone down to the social hall, or to the lavatory, or somewhere. I don't recall just where he was at that time.

Q. You mean between 3 and 3:30 A.M.?

A. Yes.

Q. And the shore patrol had nothing to do with civilian passengers, did they, captain?

A. Well, yes, in a way. In case of any violence they were supposed to assist.

Q. After this incident had occurred, you assigned two [fol. 64] men to guard the stateroom of Mrs. Weade and Mrs. Stinemeyer, didn't you?

A. Well, I had one man—they were outside on the deck, and there was a man, then we had this regular saloon watchman, because I saw they were a little nervous, and just to make them feel better.

Mr. Hoffman: That is all, captain. Thank you very much.

Redirect examination.

By Mr. Hughes:

Q. Captain, was there a roof ventilator in the stateroom, in addition to the other means of ventilation?

A. No, I don't recall there being a roof ventilator in that room.

Q. Is the quartermaster an officer or a seaman?

A. A seaman.

Q. Is the change from master of a vessel to port captain a demotion, or a change on the same grade, or a promotion?

A. A promotion.

ROBERTA L. STINEMEYER, one of the plaintiffs, having been duly sworn, testified as follows:

Examined by Mr. Breeden:

page 157:

A. We decided to leave it ajar about six inches, just on an angle, and we put the chair—a chair something of this type (indicating) up against the door, under the door knob, and pushed it there, so if there was any possible ventilation we would get it, and we left the window open.

Q. You left it ajar about how far?

A. The door.

Q. Yes. About how far ajar was it?

A. An opening of about six inches, I guess.

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Q. Now, Mrs. Stinemeyer, was there a window to this particular room?

A. Yes.

[fol. 65] Q. Was there a shutter of any kind?

A. Yes, there was a wooden slatting shutter, just slats.

Q. Will you describe for us, as best you can, that shutter with respect to what ventilation is offered?

A. Just shutters, rather thin and overlapping, and it just cut off—just hardly no air would be in there at all, and we just opened the window, opened the shutter, to get some ventilation.

page 160:

A. No; she would usually get up on the upper berth and let me have the lower berth. Sometimes I get a catch in my back, and she was just afraid maybe I would hurt my back and she would say "I will get up here. It don't bother me. I can climb around better than you can"—just in a good-natured manner; she would say, "You take the lower berth and I will get up here".

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A. ———, I saw a boy in a white coat come running around the side and up the steps.

Q. Where were you at that time? Had you come back to the room:

A: Yes, I had come back to the door, and when I saw him and he saw me, I just motioned to him, like that (indicating). I could hardly speak to him.

page 170:

A: This negro had pushed the door to, but it had not closed, it had not latched, and there was just the tiniest little bit of light coming through there, and also from an oblong ventilation near the ceiling of the room a little light would come through, and it was possible for us to have moved around and seen things dimly.

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A: Yes, and stayed with us continuously, and held us by the arm and sort of accompanied us, along with the police [fol. 66] sergeant—I can't remember his name—and Mr. Layton; and, everything that we had to do that day, we didn't get home until five o'clock in the afternoon.

Q. Mrs. Stinemeyer, can you tell me whether or not Mrs. Weade was taken to the Gallinger Hospital?

A. Yes, sir.

Q. Was she taken to any other hospital?

A. Yes.

Q. What hospital was that?

A. First, we went to the police station and gave our testimony. From there, they put us in the car and Mrs. Weade and I went in Mrs. Douglas's car and the other men followed us, and we went to the Gallinger Hospital for examination. From there we went to what they call the Episcopal Ear, Nose and Throat Hospital.

page 177:

lines 12-25 to

page 178 line 6:

Q. Mrs. Stinemeyer, let me ask you this: How long was it before Mrs. Weade could appear in public without the injuries to her face and to her eyes being apparent to anyone that would see her?

A. Almost three weeks. It was three weeks before she would think about going home?

Q. Did she stay with you.

A. She stayed right with me, and I took care of her.

Q. What was her condition during all the time?

A. Oh, just all to pieces, and nervous, and for a long time just cried every day, every day, and I just tried to keep her quiet and not to think about it any more than we could help, and just treated her eyes, and tried to get her to eat and she thought she would change the medicine one time, I guess it was about a week afterwards, I don't remember exactly, but we got ready and I took her in a taxicab to another doctor, but I can't remember who it was, for him to look over her eyes again, then we came back. We stayed right there in the house practically for the three weeks without going to see anyone or doing anything, except just staying there.

[fol. 67] Cross-examination.

page 181 to

page 182 line 5:

By Mr. Seawell:

Q. Mrs. Stinemeyer, just a few questions. Were there many people on the boat that night? Did the boat seem to be crowded?

A. Yes, the boat seemed to be pretty well filled, so far as I know.

Q. Well, would you say that they had quite a large passenger list?

A. Yes.

Q. This room that you were in 116, that was up on what is called the gallery deck, wasn't it—the deck above the saloon deck, with the railing around it?

A. Yes.

Q. And around the top of the door there was this grill or open work, wasn't there? I think you referred to it as going around the top, and through which some light came?

A. I remember a rectangular opening, something like you see up there (indicating) for ventilation. It had no grill work in it, as I remember; just a hole there in the wall.

Q. And that night, on account of the heat, you and Mrs. Weade left your door partly open?

A. Yes.

Q. You also opened the glass window——

A. Yes.

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Q. And you opened the window shutter; isn't that correct?

A. That is right.

Q. So that your door was open and your window was open?

A. Yes.

page 182:

lines 18-25:

Q. When you arrived in Washington, did you go with Mrs. Weade to the two hospitals?

[fol. 68] A. I went with her everywhere we went that day until we both arrived home.

Q. Then you arrived at your apartment about five in the afternoon?

A. About five in the afternoon.

Q. And from that time on until she came home, she remained with you, didn't she?

page 183:

A. Yes.

Q. As your guest?

A. Yes, I think she planned to come up for about a week or ten days at first. She was sick all the time she was there.

Q. And she was there for three weeks before she came back?

A. Yes.

Q. And was she in such condition, as I understood you to say, that she could not go out in public?

A. That is right.

Q. And she did not go out in public during that time she was at your house?

A. No, I took her to the doctor in a taxicab, took her there and back as quick as we could make it.

Q. She did not go into any public place where she could be seen?

A. No.

Q. If she had gone, you would have known it, wouldn't you?

A. Oh, yes.

Q. Mrs. Stinemeyer, on August 15, I believe that you and Mrs. Weade had lunch at the Mayflower Hotel in Washington, didn't you?

page 184:

A. Oh, yes, I remember that; but what I meant when I told you that we didn't go out, she didn't go to visit any of her relatives, didn't go to visit any of her friends, or anything. This was business. He asked her if it was possible for her to come down, that he would like to talk with us.

[fol. 69] Q. That was Mr. Rudrow?

A. Yes, Mr. Rudrow. That was August 15. Her eye had gotten much better, and she hesitated quite a bit about going, and she said maybe she would feel a little better if she tried to get out, and we got in a taxi and went down there and had lunch. That was a public place, of course. I talked to him, and she just broke down and cried even there.

Q. The three of you had lunch at the Mayflower Hotel?

A. Yes. He wanted to talk to us about the whole circumstances. He had been to the house once and he wanted to know if it was possible; and I said well, I would see. I had forgotten about that. I might have forgotten—let's see; in fact, we went—let's see; we got home Saturday night. Monday night we had to go to court, and Mrs. Weade

wore dark glasses. I must say that we were out in public in cases like that, but I mean not out to visit or to see any of her friends, or anything that would have made a pleasant visit for her. We did go to something that was necessary.

Q. Do you recall any other time during that three weeks that you and Mrs. Weade were out somewhere in public?

page 185:
line 13-14.

Q. Now, just one minute. You never screamed for help?

A. No. I did not.

page 185:
line 19-25:

Q. Who was it that pushed the shutter to in the window?

A. Mrs. Weade stood up and pushed the shutter to, and turned the light on at the left hand end of her bed as she got up.

Q. And you started out then and you met this boy in the white jacket, I believe you said?

[fol. 70] page 186:
lines 1-8:

A. Yes.

Q. Coming up the steps.

A. Yes.

Q. That is, from the saloon deck up to the gallery deck?

A. Yes.

Q. And you told him to go and get help?

A. Yes.

LILLIAN A. WEADE, one of the plaintiffs, having been duly sworn, testified as follows:

Examined by Mr. Breeden:

page 193:
lines 2-6:

Q. When you retired, Mrs. Weade, did you latch your door, or did you leave it open?

A. We left it open.

Q. And how far open was it?

A. Well, I would say about six inches.

page 193

lines 10-16:

Q. How about the window. In which direction did the window open?

A. The window was open, I think, when we went in the stateroom.

Q. Did you close it or did you leave it open, if it was open?

A. Left is open.

page 200:

lines 2-6:

Q. Now, I don't want you to tell what was said there, Mrs. Weade; but was that at his suggestion or your suggestion?

A. It was his suggestion. He invited us. In other words, Mrs. Stinemeyer has a small apartment, and he invited us down to the hotel. We had lunch with him.

[fol. 71] Cross-examination.

page 204:

lines 22-25:

By Mr. Seawell:

Q. And it was quite a warm night?

A. Yes.

Q. And there was quite a number of passengers on board the ship?

page 205:

line 1:

A. Yes, sir.

page 206:

lines 2-25:

Q. Now, when you went into your room and retired, you left the door partly open?

A. That is right.

Q. And you left the window and the shutter open?

A. Yes.

Q. Mrs. Weade, didn't you see the warning sign on the wall of your stateroom, not to leave you shutter open?

A. I did not see it.

Q. You didn't see that?

A. I didn't notice it.

Q. Would you say that one was not there?

A. I don't say that it was or that it was not; I don't know.

Q. You don't remember reading a warning sign on the wall of your stateroom, "Keep your shutter closed"?

A. No, I do not. If it was there, I didn't notice it.

Q. You said something about a position that you had. Did you not submit a letter of resignation effective June 30, 1945?

A. That is right.

Q. However, you were carried on the payroll through July 14 on account of earned vacation that was coming to you?

A. That is right.

[fol. 72] Q. And that letter was tendered by you, and it was of your own volition that you requested the resignation?

page 207:

line 2:

A. Yes, sir.

ALLEN SMITH, called as a witness by and on behalf of the defendant, having been duly sworn, testified as follows:

Examined by Mr. Hughes:

page 219:

Q. Mr. Smith, you are the president of the defendant, Dichmann, Wright & Pugh?

A. Yes, sir.

page 220 l. 5-25.

Q. How long have you been connected with the shipping business?

A. I began it in 1919.

Q. And where?

A. In Norfolk.

Q. And in what capacities have you been connected with it from then until now? Just in general way, not in detail.

A. Well, in all phases of it.

Q. Starting how?

A. I started as cashier and I came on up through the balance of the positions.

Q. What is the nature of this firm, Dichmann, Wright & Pugh?

A. We are general steamship agents, operators.

Q. With offices where?

A. Norfolk, Baltimore, Philadelphia, and New York.

Q. And where is your principal place of operation?

A. Norfolk.

Q. How long have you been president?

A. Since October 19, 1944.

[fol. 73] page 221, 1. 5-10:

Q. In this case there has been filed a contract under which your company was made general agent for the operation of the steamer Meteor. What were the circumstances under which the Meteor came into use between Norfolk and Washington?

A. Well, previously to that, we had been appointed general agents for the War Shipping Administration—

(page 222 1.21-25)

A. (Continuing) for the operation of vessels in the war effort to the other side. We were operating some twenty-vessels for the War Shipping Administration as agents under the contract that was originally signed by Saunders.

The Navy, due to the fact that two of the vessels of the Washington Line had been taken, insisted that the War Shipping Administration supply another vessel and put on nightly service, for the Navy required a good many people to go back and forth between Norfolk and Washington, and—

page 223:

Q. Prior to that insistence, what service was rendered?

A. Every other night. The Norfolk & Washington Steamboat company operated a vessel from Norfolk—one night from Norfolk, the next night from Washington.

I was called to Washington at the end of May or early June—I don't remember exactly—and told that this would have to be done and that, as we had officers here in Norfolk, they wanted us to do it.

We undertook it, and our contract was amended to include the carriage of passengers and the operation of this METEOR as well as the District of Columbia.

Q. Now, under your contract, by virtue of which this vessel was operated, how were the master and the rest of her complement employed? What was the routine?

A. We were to employ these in behalf of the Government.

Q. What did you do about the master? What was the routine as to the master?

A. We appointed Captain Hudgins, whom we knew, who had the proper qualifications, who had the necessary [fol. 74] licenses, pilot licenses, and with Captain Hudgins and the assistance of our office we obtained a crew to assist him in the navigation of the vessel.

page 224:

Q. What were the labor and employment conditions at that time as to the procurement of such employees? Were they normal or abnormal?

page 226, l. 20-25.

A. Very abnormal.

Q. In what respect?

A. Of course, the draft was in effect. Men were being taken for the Army, the Navy, and the Marine Corps and all the balance of it.

page 227, l. 1-7:

The Coast Guard, at the request of the Maritime Commission in order that crews might be found for the merchant vessels to carry the war materials, had set up a system whereby they certified men as capable seamen. These men went down to the Coast Guard headquarters, were examined by the officers of the Coast Guard, were finger-printed, had certificates issued to them—

page 228 l. 5-17:

A. These certificates were issued by the Coast Guard to the men. The War Shipping Administration also had set

up a pool, where the men reported and were assigned to the various vessels.

Q. How was that pool filled?

A. That pool was filled by application of the men to the pool. It was maintained down on Bank Street.

Q. With Coast Guard certificates?

A. No, with Merchant Marine men; but when a man made application he had to have his certificate, issued by the Coast Guard, in order to register in the pool. When a man was needed for Italy, or France, or this line, or anything else—

[fol. 75] page 231, 1.16-24:

Q. Mr. Smith, can you testify as to the prevailing practice with reference to the staffing of vessels in local service, other than the Norfolk-Washington Line?

A. Only by conversations that we had with the Baltimore Line, whereby they were required to have Coast Guard certificates for their men, the same as we had to have them for ours.

Q. And that was the only other line of this character that was operating wasn't it?

A. That is right.

page 232-1. 7-21:

The Witness: The whole point of it is that the war was on, and men were being taken for the draft, and the Government was accounting for every man.

By Mr. Hughes:

Q. And these men had to be released from the draft before they could be employed?

A. They could not be released from the draft unless these cards were signed—unless they had these certificates.

Q. Now that we are through with these preliminaries, was the employment of the personnel, the complement of the METEOR, found to be difficult, or simple and easy?

A. It was very difficult.

Q. What about the time available for investigation of prospects? Was there ample time to make such investigations, or were the employments almost always in emergency?

page 233, l. 11-25:

Q. Now, Mr. Smith, answer that question about whether there was time to make selections, or whether many of the instances of employment were in emergency.

A. We usually relied upon the investigations the Coast Guard had made, when they furnished the certificates.

Q. How about the turn-over in the employment on the METEOR. Was it large or small?

A. The turn-over was large.

[fol. 76] Q. Now, departing for the time from that subject, what was the routine of the operation of the Washington-Hampton Roads Line? How was that operated?

A. Prior to what?

Q. What was the routine of the operation of the Washington-Hampton Roads Line? What was the Washington-Hampton Roads Line?

page 234 l. 1-7:

A. Well, "The Washington-Hampton Roads Line" was the name given the line by the War Shipping Administration, to differentiate it from the Norfolk & Washington Steamboat Company which had operated the service previously.

Q. Now, under this contract, you employed a master for the United States?

A. Yes.

page 234 l. 17-25:

page 235 l. 1-20:

Q. Then you turned over to the master for employment for engagement by him, under the very words of the contract, the rest of the officers and crew?

A. That is right.

Q. Where did the money come from for that?

A. It was the money of the United States Government.

Q. What was the routine under which it was supplied?

A. We were supplied with a revolving fund by the War Shipping Administration, which we had to deposit in a special account, and all payments for wages and supplies and repairs, and that sort of thing, are paid from this account.

Q. And where was that account carried? What was the name of that account, and how was it operated?

A. Well, we had a fund transferred, by permission of the War Shipping Administration, from the account we held in Baltimore, over to the Lincoln National Bank in Washington under the name of "Dichmann, Wright & Pugh, Incorporated, General Agents, Special Account". That account was subject to signature of two of our authorized men, but not independently, although the officers of the United States Government signatures were listed on the card at the bank [fol. 77] and they could, quite independently of us, withdraw all of the money.

Q. And how was that account replenished as it was used?

A. When we submitted payrolls, bills, or accounts to the auditors, they would draw us a check for like amount, which was put back into the account.

Q. Was any of the defendant's money used for the operation of this vessel?

A. No, sir.

Cross-examination.

By Mr. Breeden:

page 239 1. 3-25:

page 240 1. 1-13:

Q. Do you know of, in your position as president of the line, or did you ever direct, as such president, a safeguarding system of inquiry with respect to employees on your passenger line? If you know, Mr. Smith—

A. All I can say is this, Mr. Breeden, as I said before, that the precautions taken by the Government, the Coast Guard and the Merchant Marine, when a strange man came to us, was about the most we had to rely on. Certainly we could not write to the forty-eight states and the F. B. I. and sail a ship every night from both ends of the line. Now, if we found any man who did not perform his duty properly, we let him go without the slightest ceremony at all.

Q. Mr. Smith, what you are saying, if I understand you in that all-inclusive statement, is that you used the same care and precaution for putting a man on the MEREON, that was hauling the general public and among them, unattended ladies, such as the plaintiffs here, as you did on a ship hauling cattle or general merchandise?

A. No, no. We did differently from that.

Q. Now, what did you do differently? What did you do in employing Barnes that you did not do in employing a seaman on a merchant ship, if you know, Mr. Smith? May be that came before you? —

A. Of course, you see, when you employ a cook on a ship, you want a man *than* can cook —

[fol. 78] Q. I beg your pardon. I don't want to mislead you. I don't mean that when you wanted a cook you hired an oiler or a wiper or a fireman, but I don't think the system used in employing them was any different.

A. I can only say, in the case of this man, who had been previously handled by the governmental agencies, that we took their investigation as sufficient.

Q. Do you have the investigation that was made by these other agencies as to this Negro man?

A. No, When he came down with a slip from the pool and his certificate from the Coast Guard, that was sufficient.

page 241 1.4 to

page 242 1.25:

Q. No, you mentioned your bank account; you were talking about your bank account, and there was a special account in the Lincoln National Bank?

A. Correct.

Q. In Washington, D. C.

A. Correct.

Q. Just to trace something specific, now, when you would take Mrs. Weade's fare at Old Point—and she paid you in cash, because you required fares to be paid in cash—you didn't take that money and run up to the Lincoln National Bank and put it in there did you?

A. Every day a deposit was made in the Lincoln National Bank.

Q. Did you take her cash and take it to Washington, or did you do it by putting it in your bank account and making some exchange of funds?

A. No, the money was taken from the ship, the collection of fares from the agents, and put into the bank.

Q. By your Washington office?

A. That is right.

Q. And it was drawn on by officers, agents, or managers of your company, and also, I believe you said, certain representatives of the War Shipping Administration could draw on the fund?

A. That is right.

Q. Did they draw on it?

A. No.

[fol. 79] Q. As a matter of fact, Mr. Smith, the reason why that system was there was because if something had happened—that your company would never be guilty of—namely, something go wrong with the accounts, they could walk into the bank, sign a check, and draw it, so that you would have no further defalcations; isn't that true? It was a protective measure, and in actual operations was never used?

A. No, it was a matter of title to the money.

Q. I believe you said the style of the account was "Dickmann, Wright & Pugh?"

A. Correct.

Q. And the signatures of the War Shipping's agents were never used? They never signed a check? I believe you so stated.

A. Yes, that is correct; that what I am trying to say is this: that a resolution was passed by our Board of Directors, approved by the Accounting Department of the War Shipping Administration, proving the name under which this account should be established. A copy of that resolution was filed with the bank, and it specified that the title to the money rested in the United States Government.

page 244 1.18-25:

Q. Oh, there was another bank account?

A. Yes, we had another bank account in Baltimore.

Q. How did the money get into that bank account?

A. As I told you before, when we started this operation we transferred funds from Baltimore to Washington, under this same title, and under the permission of the War Shipping Administration.

Q. Did you leave money in the Baltimore bank?

page 245 1. 1-17:

A. Yes, sir; oh, yes, sure.

Q. Did that account have to be replenished also, from time to time?

A. Oh, yes.

Q. And you deposited money in it, then, from time to time?

A. That account was different from the Washington account, because all of the money, the revenue from the [fol. 80] vessel, was deposited in the Lincoln National Bank. The account in Baltimore was an outgoing account, because there was no freight paid by the War Department or by the Navy Department or anyone else that we carried supplies for.

Q. That had nothing to do with the passenger vessel?

A. That had nothing to do with the passenger vessel. However, the control of these funds in Washington was kept in the Baltimore books so the War Shipping Administration could check them.

page 246

line 16 to

page 252

line 5:

Q. No, I was not going to read that. I was going to read this Article 8:

The United States shall, without cost or expense to the General Agent, procure or provide insurance against all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder (which insurance shall include the General Agent and the vessel personnel as assureds) including, but without limitation, marine, war and P&I risks, and all other risks or liabilities for breach of statute and for damages caused to other vessels, persons or property, and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorney's fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance".

Is that correct?

Mr. Hughes: One minute before you answer that. If Your Honor please, we wish to make a motion and would like to have the jury retire.

The Court: Gentlemen, will you retire to your room? (The jury retired.)

Mr. Hughes: If your Honor please, we think that this bringing in of the insurance question is prejudicial, and [fol. 81] that it is well settled that it is appropriate in such

circumstances to make a motion for a mistrial, and we make the motion on that ground.

Mr. Seawell: There was a case that went up from this Court, of *Newby v. Sawyer*, reported in 166 Federal—

The Court: Mr. Seawell, did that case involve a contract providing for insurance which had been exhibited in evidence?

Mr. Seawell: No, sir. It is a case deciding for this circuit the principle that insurance cannot be mentioned before the jury.

Mr. Hoffman: If Your Honor please, our contention on this is just this fact: Dichmann, Wright & Pugh have contended, and they have attempted through Mr. Smith, to plead to this jury, that this poor lady is unfortunate, but they did everything possible, and say they are a corporation that has just tried to perform a patriotic duty and it would be a shame to put the burden of any loss upon them; whereas they are defending definitely under the contract, itself. The contract is in evidence; it was introduced by our friends here in answer to interrogatories, without any objection. They have at no time stated that they intended to rely on portions of it, but that they are relying on the entire contract. Now, when they turn around and say that Dichmann, Wright & Pugh could not do this and could not do that, when that is not in the contract, then certainly we are at liberty to show that Dichmann, Wright & Pugh cannot suffer financial loss under this claim. They could not possibly suffer a financial loss under this contract.

Now, your Honor, did not permit us to ask Mr. Smith, but the compensation was a million and a half dollars, as I am informed, for the patriotic service that was performed. I don't know, but that is what I was informed. Now, that can't go before the jury, but the fact remains, if Your Honor please, that this contract is in evidence without objection, and our friends are relying for a defense in this case on this very contract. They asked for it, they want it. Other paragraphs have been referred to and at no time have they ever said anything that they wanted this excluded in any manner.

[fol. 82] Now, it comes down to the point of determining what the effect of their argument is going to be. Their argument will be to tell the jury that it is a shame to hold Dichmann, Wright & Pugh victim for this terrible crime.

Suppose we have a perfect right to say they are not the victim? Because it is in evidence before this jury now. In other words, the contract had not actually been read, but when it was introduced by our friends without objection, it should have been read *in toto* at that time.

Mr. Breeden: Let me say one other thing. Your Honor, because, if this is improper, I take the position that I, as questioning the witness, have been entrapped by my friends on the other side.

As Mr. Hoffman has already said, the contract was put in evidence. There was no objection to any part of it. Had the defendant intended to ask the Court to exclude this, then when references have been made in this trial to this contract, and, in fact, parts of it have been read from, they made no objection whatsoever.

Now, I am asking this question, I read, Your Honor; slowly. I read Article 8, and I believe Mr. Seawell knows what Article 8 of this contract is. I read, "The United States shall, without cost or expense to the General Agent, procure or provide . . .". There was plenty of time for objection, but he sat patiently by. He could have objected to a question by which he thought something might get to that jury that he would not likely enjoy, but his thought was that he would sit patiently by and listen to a lengthy reading and then get up and object.

I submit, your Honor, that I have acted within entire propriety, even if the question was not proper.

For the moment, I am considering the motion for a mistrial. The contract has been in evidence. It has been lying over there before the jury. If a juror had picked up this contract and started reading it, would Mr. Seawell have walked over and taken it away from him? Or would the Court have asked the gentlemen of the jury to put it down? The contract has been in evidence since the very first document in the trial and no one has made the slightest objection to it or to any reference to any part of it, and I submit that any objection to reference to any part of the contract, from [fol. 83] Alpha to Omega, comes too late from my friends at this time. Now, an improper reference to it is another thing, but I have only read from the contract, when he got up and objected. If he has a valid reason to prevent the witness from answering it, all right, and we will address ourselves to the appropriate question, but as far as my

reading verbally to the jury the contract, which is a piece of evidence referred to by Mr. Seawell in his opening statement, I don't see in the slightest how it can be ground for a mistrial.

Mr. Seawell: If Your Honor please, both of my friends have, peculiarly enough, expressed to Your Honor the very thing that our appellate court, and practically every other court, that has passed upon this question, have said should not be said before a jury. They have told Your Honor boldly that they wanted to show to the jury that this concern would not be harmed by a verdict—they have actually told you that that is their purpose. So, not only have they committed the fault, but they have given you the underlying reason, which the court says is the thing that is prejudicial.

Now, if Your Honor please, we did not introduce this agreement in evidence. It was introduced in evidence by the plaintiffs, themselves, and is marked as such.

Redirect examination.

By Mr. Hughes:

page 264
line 16 to
page 265
line 25:.

Q. Mr. Smith, what was the exact designation of the account in the Lincoln National Bank? There *was* been a good deal of loose reference to it here and I want to know the exact designation of that account.

A. My recollection of it is, Mr. Hughes, that when we established that it was "Dielmann, Wright & Pugh, Incorporated, Agents—General Agents—Special Account." That was the style of the account specified by the War Shipping Administration.

[fol. 84] Q. Since consultation, are you willing now to answer the question as to what your remuneration was from this line?

A. Yes, sir.

Mr. Breeden: Your Honor, I think that we withdrew the question, as a matter of fact.

By Mr. Hughes:

Q. Then, I will ask you, what was your remuneration from the operation of this line?

A. As I said to Mr. Breeden, there was no agreement about our compensation until well toward the close of the operation. As a matter of fact, it was a sort of special operation, and when they called me to Washington I told them that we specified no amount, we would not even require the War Shipping Administration to hold to the regulations in support of the contract; that I did not want them to feel they had to pay us anything. We already had a contract for the operation of the overseas ships; we had a staff in Norfolk competent to handle the engineering end of it. They allowed us to take over the staff of the line that was already operating. We paid no salaries to any of our officers from the line at all. The only salaries we paid were those who were actually operating the line. When the final settlement came, the War Shipping Administration—that was after the line was closed—the War Shipping Administration assumed certain portions of the expense and gave us \$8,000 for operating the line.

Recross-examination.

By Mr. Breeden:

page 266
lines 21 to
page 267
line 8:

Q. Mr. Smith, in the operation of this line, you let the amount of your company's compensation remain open until near the termination of the contract?

[fol. 85] A. We let it remain open at the convenience of the Government.

Q. Did your company realize any indirect profits from the operation of the line?

A. None at all.

Q. No concessions in connection with it on the vessel or in connection with its work?

A. None at all.

Q. From forwarding, or anything of that kind?

A. None at all.

page 273 lines 1-5

A. I was in Norfolk at the time of the occurrence, and I asked Mr. Rudrow, our vice-president, to immediately go to see Mrs. Weade and see what could be done to help her, and give her any assistance of any kind that we could. That is our usual custom in handling anyone aboard ship.

IRVING I. ROSENBERG—witness by and on behalf of the defendant, having been duly sworn, testified as follows:

Examined by Mr. Hughes:

pages 306-315

line 15:

Q. You have been in court and know what this case is about?

A. Yes, sir.

Q. What was your occupation at the time of the occurrence which is involved in this suit?

A. Chief purser.

Q. How long had you been aboard the Meteor?

A. Since one week before she was put into operation; that was, I think, June 14.

Q. One week before she was put into operation?

A. Yes, sir.

Q. What were your duties at the time of this occurrence?

[fol. 86] A. My duties were to see that the passengers were assigned to the proper rooms, sell tickets, see if any complaints or anything pertaining to the passenger's comforts were taken care of, in charge of the dining room, collecting the cash from the dining room, the saloon, newsstand, and in charge of everything pertaining to the passengers.

Mr. Hughes: We have the originals of these; I can't find them at this moment. I will use these temporarily (showing papers to counsel).

Mr. Hoffman: Is there any question about it?

Mr. Hughes: I don't know of any.

Mr. Hoffman: They have testified they were riding on the boat.

Mr. Hughes: I don't know of any question.

Mr. Hoffman: Step up here to the Judge.

(Counsel conferred with the Court at the bench, out of the hearing of the jury.)

Mr. Breeden: You are going to use these originals?

Mr. Hughes: Yes.

Mr. Breeden: Fine.

By Mr. Hughes:

Q. Mr. Rosenberg, I show you a piece of paper with print on it. Tell me what it is.

A. That is a ticket from Old Point Comfort to Washington, D. C., purchased on July 25 at the Old Point Comfort office and used on August 8, 1945, on the Steamer Metcor.

By Mr. Hoffman:

Q. Used what date?

A. August 3. I am sorry. It looked like "8."

[fol. 87] By Mr. Hughes:

Q. Purchased on the wharf, you mean? The Old Point Comfort office at the wharf?

A. At the ticket office on the wharf.

Mr. Hughes: We offer this in evidence as Defendant's Exhibit 1. (The ticket referred to was received in evidence and marked Defendant's Exhibit 1.)

Q. I hand you another piece of paper with printing on it. Tell me what it is.

A. That is a stateroom card, calling for stateroom 116, issued to Mrs. F. M. Weade, ticket number 5138.

Mr. Hughes: We offer this as Exhibit 2. (The last mentioned paper was received in evidence and marked Defendant's Exhibit 2.)

Q. Did you know Jack Barnes?

A. Well, I knew him as well as I could have known any member of the crew. Of course, there were so many of them.

Q. Had you been aboard from the time that he was employed, in the early part of July, until this occurrence?

A. Yes, sir.

Q. What was your observation of him as to his conduct and demeanor?

A. Well, the only way I could tell was when I paid them, and when they were off, hurt or anything, and if they didn't get in any trouble that I had to tend to them, and they took care of themselves, therefore, I thought they were pretty good.

Q. What do you mean "tend to them"?

A. Well, I did the medical work aboard, too.

Q. You did the medical work.

A. Yes, sir.

Q. So, if there was any cutting or wounds, they came to you?

A. Yes, sir.

Q. Was there anything about Jack Barnes to suggest to you that he would be a "bad actor" in any way?

A. No, sir.

Mr. Hoffman: If Your Honor please, I move to strike the answer. I don't think the fact that he has negated the question—he is not competent to say.

[fol. 88] The Court: The objection is overruled. It is negative testimony but I think it is proper. I overrule the objection.

By Mr. Hughes:

Q. Did your duties have anything to do with the state of the staterooms?

A. Yes, sir.

Q. What?

A. Well, any complaint on the stateroom came to me and, therefore, it was my duty to see that the staterooms were made up properly, or if there were broken windows or locks, or anything at all, it was reported to me and I made a written report to the carpenter on the deck, to have them repaired, or anything on the deck.

Q. Did you have any complaint on room 116?

A. No, sir.

Q. How about the bell?

A. The bell system was working.

Q. Can you give us any information about insect screens in the windows of staterooms?

A. There were no insect screens in any of the passenger staterooms aboard the boat.

Q. What rooms on the vessel had insect screens?

A. The two mate's rooms and the galley were the only ones that had screens.

Q. Now, where were your office and room on the vessel with reference to the location of room 116?

A. My office was on the port side, slightly aft of amidships, I would say; on the port side of the stairway as you go up to the balcony where room 116 was situated. In other words, it was diagonally across from my office. I could see it when I stepped out of the door of my office; I could see 116.

Q. Was your office forward or aft of room 116?

A. Forward.

Q. What was your first knowledge of this occurrence on the vessel that morning?

A. This Phil Sharlash, I think his last name was—I know we called him Phil—he knocked at the door and said; "There has been some trouble. Come right away."

[fol. 89] Q. Had anyone been at your door of either your bedroom or your office prior to that?

A. No, sir, no one knocked that I heard.

Q. What is the situation of your stateroom with reference to your office?

A. My Stateroom is practically in the office. In other words, the door to the office is in a small alleyway, and my bed is approximately 12 feet from the door and about 6 feet from the window.

Q. In your capacity as purser and as medical man, are you subject to calls in your stateroom and in your office?

A. Not only subject to call, but I was on constant call. There was seldom a night passed that I was not called by someone or another.

Q. If there is a knock on the door, are you in such a situation that you can hear it?

A. I always hear it immediately.

Q. What time does the cook go off duty?

A. Which cook is that, sir?

Q. Jack Barnes, or the one that is on duty in the passenger service.

A. He was the second cook. They went off at 9 o'clock if I am not mistaken.

Q. Does he have any duties in connection with the staterooms?

A. None whatsoever.

Q. Where is his place of duty?

A. In the galley.

Q. And where is his place when off duty?

A. The crew has quarters up forward below the main deck, and they are allowed on the main deck, that is, as far back as the saloon. They are not allowed to pass that door on the main deck.

Q. Have you any idea of employment conditions at the time that Jack Barnes was employed as cook?

A. Yes, sir.

Mr. Hoffman: The same objection, if Your Honor please.

By Mr. Huglies:

Q. As to whether the situation was normal or acute in obtaining employees.

[fol. 90] A. I was the one that had to pay them off when they left the ship and had to sign them on, more or less, when they were hired, and we had a terrific time of it. I was supposed to be off when the ship tied up in Norfolk and Washington, but I never left the ship until 12 or 1 o'clock, on account of this situation.

Q. Was the turnover frequent or infrequent?

A. Very frequent.

Cross-examination.

By Mr. Breedon:

Q. Mr. Rosenberg, Mrs. Weade's stateroom ticket is the one that you have referred to?

A. I didn't compare the number on the stateroom card, so I can't tell you whether that is hers or Mrs. Stinemeyer's.

By Mr. Hughes:

Q. Compare it now, will you?

A. Yes, sir.

By Mr. Breedon:

Q. That is Mrs. Weade's?

A. That is Mrs. Weade's.

Q. Would Mrs. Stinemeyer have a like ticket, or would

she be entitled upon purchasing a transportation ticket to occupy that same room?

A. She could occupy that same room.

Q. So, if these ladies had purchased the proper tickets and were in the proper room at the time of this occurrence—If Mrs. Weade was in the proper room—Mrs. Stinemeyer was entitled to be in there, too?

A. She could have anybody in there that she wanted.

Q. This second cook, this fellow Barnes, when 9 o'clock p. m. arrived, was supposed to leave the galley, or kitchen, on the ship and go down three or four flights to where his room was, or his quarters, and was not supposed to come up at any time?

A. Oh yes, he could come up for coffee. All ships are allowed coffee at any hour of the day or night.

Q. So that if he got up there, it would be in connection with his duties, then?

A. No, no—necessarily.

[Feb 91] Q. Well, it has got to be one way or the other.

A. I said he could come up for coffee. Aboard ship coffee time is anytime.

Q. And that is for the purpose of the ship's crew?

A. Any member of the crew can have coffee at any time.

Q. He, as assistant cook, would be the one to make it?

A. No, he doesn't have to make it; it is already made. Whoever is on duty makes the coffee.

Q. How about if he was drinking spirits, whiskey or something like that, at 2:30 in the morning in the galley; would that be in connection with his duty?

A. Not, if he was drinking in the galley, no, or any other part of the ship.

Q. Did you know that he had been drinking on that ship?

A. No, sir.

Q. You heard Captain Hudgins testify that such had come to the attention of certain of the ship's personnel?

A. I heard that someone said he had been drinking.

Q. Was that reported to you by anyone?

A. No, sir.

Q. I believe you said that when you paid off Barnes he looked like a good man to you.

A. I will say he did, yes.

Q. Most people when you are paying them off are sort of at their best, aren't they?

A. No, sir, not seamen. That is when a seaman is at his worst. That is when he has got his beefs, and are usually giving you some argument about their money—not getting enough money, or it is this or that, or something.

Q. How did you pay them? By Cash?

A. By cash, in an envelope.

MILLS E. BELL, called as a witness by and on behalf of the defendant, having been duly sworn, testified as follows:

page 317 to 322,
line 11;

Examined By Mr. Hughes:

Q. And you are employed by Dichmann, Wright & Pugh?
[fol. 92] A. That's right, sir.

Q. And in what capacity at this time?

A. You mean right now?

Q. Yes.

A. I am purchasing agent and port steward.

Q. What is your age?

A. Fifty-three.

Q. Were you connected with the company at the time of the occurrence which is involved in this suit?

A. I was connected with Dichmann, Wright & Pugh.

Q. In what capacity?

A. Assistant port steward.

Q. And in that capacity, what contacts did you have with the steamer METEOR?

A. Well, I bought food for the steamer METEOR when she was in Norfolk, and if they had any trouble in the steward's department I tried to get it ironed out.

Q. How much and how often were you aboard her?

A. When she first started running we were aboard her right much, and then later we were not aboard so much.

Q. What connection did you have, if any, with the employment of Jack Barnes, the second cook?

A. Around June 25 or 27, Mr. Allen Smith put me aboard

the ship to see if I could help improve the service on the ship insofar as the steward's department was concerned—only the steward's department—and it was while I was riding the ship at that time this man was hired.

Q. What was the detail or routine of his hiring?

A. He came along at the request of Mr. Deering at that time from the Government pool of men, and the reason I happen to know that he came aboard and remembered him, was on account of the fact that he travelled with a very small man as a first cook, and we hired them both at the same time, the first cook and the second cook, and when he was hired he was sent to me aboard the ship, and, so far as his capabilities as a cook were concerned, that was what I was interested in.

Q. Well, did you interview him and then employ him?

A. Yes. Not only did I talk with him and interview him, but I watched him work.

Q. Now, tell me, what was your observation of him with reference to his conduct?

[fol. 93] A. My observation of that man was that he was a very quiet man. He was not the usual type of seagoing colored people. He was not boisterous; he was reserved; he was not loud.

Q. Did you ever observe anything about him that made you dissatisfied with him?

A. No, sir.

Q. What were the employment conditions and circumstances at that time? Were they normal or abnormal? Was it easy or difficult to obtain employees?

A. It was very, very difficult to get crews.

Mr. Hoffman: The same object on, if Your Honor Please all the way through to these questions.

By Mr. Hughes:

Q. Why was that?

A. On account of the war.

Q. Was the turn-over frequent or infrequent?

A. The turn-over was very great, sir.

Q. How did Jack Barnes qualify as to his ability with his job?

A. As a second cook, he was very good. He was later made first cook.

Q. When was his tour of duty over?

A. You mean—

Q. What time did he get through with his duties? What time of day or night?

A. Either 8 or 9 o'clock at night.

Q. Do you mean sometimes 8 and sometimes 9?

A. That's right. It depended on which one came first in the morning?

Q. Where was his place of duty?

A. His place of duty was in the galley.

Q. And where was his place when not on duty?

A. In his quarters, below the main deck forward, or either on the main deck in his leisure hours, or staggered hours.

Q. That is the freight deck?

A. The freight deck, yes, sir.

Mr. Hughes: Answer this gentleman:

[fol. 94] Cross-examination.

By Mr. Breeden:

Q. Mr. Bell, at the time of this occurrence, were you still on the METEOR, or were you back in Norfolk, then?

A. I was in Norfolk, sir.

Q. In other words, you went on board around June 25 or 27?

A. I went aboard on the 28th of June.

Q. You were still on board on July 8th when Barnes was employed?

A. Yes, sir.

Q. And when he came, he had already been hired? He came with the other man that was going to work?

A. He had been engaged, but he was not actually put to work until he had interviewed me.

Q. I believe you said that you were interested in his capabilities as a cook?

A. That's right.

Q. And that you inquired about how he could cook, and so forth?

A. That's right.

Q. And that was followed through by observing how he could cook and conduct himself?

A. That's right, yes, sir.

A. And that was the type of investigation that you made?

A. Yes, sir.

Q. As to his capabilities?

A. Yes, sir. We needed a cook and he was it.

Q. And that was the only type of investigation that was made?

A. By me.

Q. Did I understand you to say he was promoted?

A. That's right, yes, sir.

Q. And when was he promoted?

A. Around the 10th of—I think it was about the 10th of August—been on there about two days.

Q. About the 10th of August? All right, sir, thank you.

A. No, that was not August—July, I am sorry.

Q. He was promoted after he had been on there two days?

[fol. 95] A. Yes, sir.

Q. And it is your recollection that he was chief cook on there when this thing happened?

A. No. He was promoted about July 10, and I got off on the 11th. Now, what the other steward that was on the boat did with him after that, I have no knowledge, but at the time he was promoted from second cook to first cook.

Q. In other words, he came to work on the 8th, was promoted on the 10th, and you left on the 11th, and you don't know anything else about it?

A. That's right.

CHARLES ATKINS, called as a witness by and on behalf of the defendant, and having been duly sworn, testified as follows:

Examined by Mr. Hughes:

pages 322 to 327,

line 17:

Q. What was your position on the METEOR?

A. Saloon watchman.

Q. What were your duties as saloon watchman?

A. Policing the two decks.

Q. Which two?

A. The saloon and boat deck.

Q. Is that the same as the gallery deck? Is the boat deck the same as the gallery deck?

A. The same thing.

Q. How did you perform that duty? What did you do to police those decks?

A. Just walked around on the decks.

Q. How often?

A. Well, all the time I was on duty.

Q. What time were you on watch the early morning of August 4, 1945?

A. You mean, where was I.

Q. Now—What time did you go on watch?

A. Eleven o'clock;

Q. What time?

A. Eleven.

[fol. 96] Q. And your watch was from 11 to when?

A. Until 8 o'clock the next morning or until the boat docked.

Q. Eleven P. M. until the boat docked?

A. Yes: it was either 8 or 11.

Q. And what was it on the occasion when this occurrence took place which is involved in this case? What time did you go on duty that morning or night?

A. Well, when we would be sailing from Norfolk, on that occasion, Mr. Sharlash, he was my superior officer, we usually cooperated together in the afternoons when we were putting passengers board, that is, directing them to the purser's office and any other assistance they might need.

Q. Were you on duty between 3 and 4 in the morning?

A. I was.

Q. What was the first knowledge you had of this occurrence?

A. The first knowledge I had of it, this young white boy came out of the galley and came back to me and asked me if I was the watchman. I told him yes. He said a lady had been attacked in 116.

Q. Then you did what.

A. I went immediately and got the Shore Patrol.

Q. And then what?

A. I don't remember whether we went immediately to the captain's quarters or went back to Mr. Sharlash's room—the other saloon watchman. I think we went to the captain's office first.

Q. Then what did you do?

A. We waked the captain up; Captain Hudgins.

Q. Did you accompany the captain when he went to the room?

A. I did.

Q. Had you observed these ladies and their room prior to the occurrence?

A. No, sir.

Q. Where were you when he told you about it?

A. About 20 feet from where 116 is located; it might be more.

Q. Were you within sight of the room, or the room in sight of you?

A. I could see it.

[fol. 97] Q. Were you in position where you could have heard them call?

A. Yes, sir.

Q. Were you called?

A. No, sir, not until Culpepper called me—this young white boy.

Q. Had you observed that room during the night or evening as to whether the door was closed or open?

A. I had noticed the door being cracked open.

Q. Did you accompany the master when he went down into the quarters and brought Jack Barnes up?

A. Yes, sir.

Q. Have you any knowledge of the call-bell in that room?

A. Any knowledge?

Q. Yes—whether there was one in the room and whether it was in order.

A. There was a call-bell in all of the passenger rooms.

Q. Do you know where the button was situated?

A. No, sir. It is situated different places in different rooms. One type of room, it will be located one place.

Q. And you don't know where it was in that room?

A. No, sir.

Q. Do you know whether there was any fly screen in 116?

A. No, sir, there wasn't any.

Q. Was there any in any staterooms?

A. If there was, I never seen it.

Q. Did you know Jack Barnes?

A. No, sir, I didn't know him before this happened.

Q. Did you know him before it happened?

A. I didn't know him before it happened?

Q. Did you see him anywhere around before this occurrence?

A. No, sir.

Q. When you were notified or called, were you sitting or standing?

A. I was sitting down.

Q. Had you observed either of these ladies before you were called?

A. Yes, sir.

Q. Tell what you saw, please.

[fol. 98] A. Well, I seen Mrs. Stinemeyer—came out to the head of the steps and hesitated for a moment and went back toward 116.

Q. Were you sitting there then?

A. I was. She came—in a few minutes she came back out again.

Q. Did she speak to you?

A. No, sir.

Q. Had she called out, or had her companion called out at any time?

A. If she had, I didn't hear it.

Q. Were you in position to hear it?

A. I think I would have heard her.

Cross-examination.

By Mr. Hoffman:

page 330:

lines 14-25

page 331:

lines 1-3:

Q. Now, when you were employed, Mr. Adkins, you were not obtained from any shipping pool, or anything like that, were you? You had gotten to know them on the boat and they knew you, and they just employed you because they knew you; isn't that right?

A. Well, Captain Hudgins hired me. I had a good record.

Q. But he didn't go to a shipping pool to get your name? He already knew you; isn't that correct?

A. That's right. I had to get my papers first, before I could get into their employment.

Q. And the paper consisted of a certificate from the Coast Guard?

A. I got two certificates. A seaman's certificate and another certificate. I have the certificates in my pocket.

[fol. 99] page 331

lines 11-25:

Q. Now as a matter of fact, your duties as saloon watchman hardly ever took you up on the boat deck or the gallery deck unless you heard some disturbance up there; isn't that correct?

A. Well, I had instructions from Captain Hudgins, also from Captain Goode, that I was to patrol inside and outside of both decks.

Q. And were you patrolling inside and outside of both decks on this particular night?

A. When I reported to the bridge to Captain Hudgins, I always went around that way.

Q. And how often did you report to the bridge to Captain Hudgins that night?

A. Well, I don't remember any particular night; I mean, not that night in particular, but I think I reported about every hour.

page 332:

Q. Certainly you remember this night, if you ever remembered any night, isn't that true?

A. No. Well, I always made it a point to report to the bridge every hour. I don't remember this one particular night. I just know that I always reported every hour. I don't recall any particular.

Q. And you didn't remember whom you reported to on this particular night?

A. Yes; I reported to Captain Hudgins.

Q. You reported to Captain Hudgins each hour?

A. No, not after he had gone off—Captain Good—up until then.

Q. How many times, then, did you actually patrol the outside of that boat deck or gallery deck?

A. How many times?

Q. That night.

A. Well, just before this happened, I had been up and brought some chairs in from up there; about every 20 or 30 or 40 minutes, all around, all over the decks.

[fols. 100-101] Q. And you brought the chairs in at about 3 o'clock, did you not, in the morning?

A. About that time, I imagine.

page 344
line 2-3.

A. Well, I could observe any noise or see most every part of the ship from where I was sitting.

Redirect examination:

page 338
line 25 to
page 339
lines 1-16.

By Mr. Seawell:

Q. This place where you were seated, you say, was about 20 feet from the door of room 116?

A. Twenty—or thirty feet. Of course, that is 20 feet from me. She would be—116 would be up on the boat deck. In other words, it would be 20 feet out to where I could look up.

Q. And then 10 feet up?

A. Approximately, yes.

Q. And were you in such position that you could see that door?

A. I could.

Q. And you could have seen anyone that came out of the door?

A. I could have.

Q. You could have heard anyone that called from that door?

A. I think I could.

[fol. 102] GAA 4-4-42

Contract WSA 4098

SERVICE AGREEMENT FOR VESSELS OF WHICH THE WAR SHIPPING ADMINISTRATION IS OWNER OR OWNER *Pro Hac Vice*

This Agreement, made as of Jan. 9th, 1943, between the United States of America (herein called the "United [fol. 103] States") acting by and through the Administrator, War Shipping Administration, and Dichmann, Wright & Pugh, Inc., a corporation organized and existing under the

laws of Delaware and having its principal place of business at Norfolk, Virginia (herein called the "General Agent").

Witnesseth:

That, in consideration of the reciprocal undertakings and promises of the parties herein expressed:

Article 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

Article 2. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose:

Article 3A. To the best of its ability, the General Agent shall for the account of the United States:

(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices;

[fol. 104] (b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agents;

(c) Equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe;

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the

United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.

(e) Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. Unless the United States shall otherwise instruct, such Bills of Lading shall contain all exemptions and stipulations usual to the particular trade or service in which the vessels may be engaged, [fol. 105] and reserve a lien upon all cargoes for the payment of freight, primage charges, dead freight, demurrage, forwarding charges advance charges for carriage to port of shipment, for contributions in general average and special charges on cargo and for all fines or penalties which the vessels or cargoes may incur by reason of illegal, incorrect or insufficient marking or addressing of packages or description of their contents. After a uniform Bill of Lading shall have been adopted by the United States, such Bill of Lading shall be used in all cases as soon as practicable after receipt thereof by the General Agent, with such modifications as shall be necessary for the particular trades in which the vessels hereunder shall from time to time be employed. Pending the issuance of such uniform Bill of Lading, the General Agent may continue to use its usual commercial form of Bill of Lading.

As soon as practicable after April 1, 1942, all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substantially that the General Agent makes no warranty or representation as to the authority of the United States or the Master to enter into the agreement,

and that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof.

Article 3B. The General Agent agrees, without prejudice to its rights under the provisions of Articles 8 and 16 hereof, to:

(a) Perform the duties required to be performed by it hereunder in an economical and efficient manner, and exercise due diligence to protect and safeguard the interests of the United States in all respects and to avoid loss and damage of every nature to the United States;

[fol. 106] (b) Exercise due diligence to see that all Bills of Lading are properly issued, all wharf receipts for freight are non-negotiable, and, where required, a freight contract or permit is issued for each shipment;

(c) Furnish and maintain during the period of this Agreement, at its own expense, a bond with sufficient surety, in such amount as the United States shall determine, such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agreement, including, without limitation of the foregoing, the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by the General Agent or its agents. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of America of the face value of the penalty of the bond under an agreement satisfactory in form to the United States;

(d) Without the consent of the United States, not sell, assign or transfer, either directly or indirectly or through any reorganization, merger or consolidation, this Agreement or any interest therein, nor make any agreement or arrangement whereby the service to be performed hereunder is to be performed by any other person, whether an agent or otherwise, except as provided in Article 6 hereof.

Article 4. (a) The General Agent and, to the extent required by the United States, every related or affiliated

company or holding company of the General Agent, authorized as provided in Article 13 hereof, to render any service or to furnish any stores, supplies, equipment, provisions, materials, or facilities which are for the account of the United States under the terms of this Agreement, shall (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States; and (2) file, upon notice from the United States, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which, in the opinion of the United States, affect the results in, the performance of, or transactions or operations under this Agreement.

(b) The United States is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this Article whenever it may deem it necessary or desirable.

(c) Upon the willful failure or willful refusal of any person described in this Article to comply with the provisions of this Article, the United States may rescind this Agreement.

Article 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Provided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942. Such compensation shall be deemed to cover, but without limitation, the General Agent's administrative and general expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than taxes for which the General Agent is reimbursed under Article

7 hereof), and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder.

Article 6. The General Agent shall exercise due diligence in the selection of agents. Such agents shall be subject to disapproval by the United States and any agency agreement shall be terminated by the General Agent whenever the United States shall so direct. Any compensation payable by the General Agent to its agents for services rendered in connection with the vessels assigned hereunder shall be subject to approval by the United States. In the event that any of the vessels covered by this Agreement are operated in a service in which an American citizen maintained a berth operation with American flag vessels on September 1, 1939, the General Agent, upon request of the United States, will assign such vessels to such berth operators as agents as may be appropriate under form of agreement prescribed by the United States. Agency fees or equivalent allowances for branch offices in accordance with schedules approved by the United States will be reimbursable under Article 7 hereof.

Article 7. The United States shall reimburse the General Agent at stated intervals determined by the United States for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than sales and similar taxes or foreign taxes of any [fol. 109] kind to the extent determined by the United States to be classifiable as voyage expenses hereunder) and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. The General Agent shall be reimbursed for sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder if the General Agent shall have used due diligence to secure immunity from such taxation. To the extent not recovered from insur-

ance, the United States shall also reimburse the General Agent for all crew expenditures (accruing during the term hereof) in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury, or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board, any payments made by the General Agent to a pension fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits under such plan, on the effective date of this Agreement, for the amount of any Social Security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise. The United States may disallow, in whole or in part, as it may deem appropriate, and deny reimbursement for, expenses which are found to have been made in willful contravention of any outstanding instructions or which were clearly improvident or excessive.

Any moneys advanced to bonded persons by the General Agent for ship disbursements which are lost by reason [fol. 110] of a casualty to the Vessel on which the money so advanced is carried shall in the event of such loss be considered an expense of the General Agent, subject to reimbursement as is in this Article 7 provided.

The United States may advance moneys to the General Agent to provide for disbursements hereunder in accordance with such regulations or conditions as the United States may from time to time prescribe.

Article 8. The United States shall, without cost or expense to the General Agent, procure or provide insurance against all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder (which insurance shall include the General Agent and the vessel personnel as assureds) including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage caused

to other vessels, persons or property, and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance. The General Agent shall furnish reports and information and comply fully with all instructions that may be issued with regard to all salvage claims, damages, losses or other claims. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to such risks. The United States may assume any of the foregoing risks except those relating to P. & I. risks and collision liabilities. At all times during the period of this Agreement, the United States shall at its own expense provide and pay for insurance with respect to each vessel hereunder against protection and indemnity, marine and war risks, and collision liabilities without limit as to liability as to the amount of any claim or the aggregate of any claims thereunder. The United States at its election may write [fol. 111] all or any such insurance, including that against P. and I. and collision liabilities, in its own fund, pursuant to a duly executed policy or policies. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to any of the foregoing risks. All insurance hereunder shall cover both the United States and the General Agent.

Article 9. In the event of general average involving vessels assigned to the General Agent under this Agreement, the General Agent shall comply fully with all instructions issued by the United States in that connection including instructions as to the appointment of adjuster, obtaining general average security and asserting liens for that purpose unless otherwise instructed, and supplying the adjuster with all disbursements accounts, documents and data required in the adjustment statement and settlement of the general average. Reasonable compensation for and general average allowances to the General Agent in such cases shall be in accordance with directions, orders or regulations of the United States.

Article 10. Salvage claims for services rendered to vessels other than vessels owned or controlled by the United States shall be handled by, and be under the control of, the United States. Salvage awards for services rendered to other vessels owned or controlled by the United States including the vessels hereunder shall be made by the United States. The General Agent shall furnish the United States with full reports and information on all salvage services rendered.

Article 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume [fol. 142] control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice.

(b) Upon giving to the United States thirty (30) days' written or telegraphic notice, the General Agent shall have the right to terminate this Agreement, but termination by the General Agent shall not become effective as to any vessel until her arrival and discharge at a continental United States port.

(c) This Agreement may be terminated, modified, or amended at any time by mutual consent.

Article 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement, shall be immediately turned over to the United States, at times and places to be fixed by the United States, and the United States may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid; Provided, That the General Agent shall, if required by the United States, adjust, settle and liquidate the current business of the vessels. Notwithstanding the foregoing provisions, when the United States shall so direct, the General Agent shall complete the business of voyages commenced prior to the date as of which the Agreement shall be terminated, and, if directed by the United States and subject to any instructions issued by the United States with respect thereto, the General Agent shall continue to book cargo for the vessels for the next

voyages after the termination of this Agreement. No such termination of this Agreement shall relieve either party of liability to the other in respect of matters arising prior to the date of such termination or of any obligation [fol. 113] hereunder to indemnify the other party in respect of any claim or demand thereafter asserted, arising out of any matter done or omitted prior to the date of such termination.

Article 13. Agreements or arrangements with any interested or related company to render any service or to furnish any stores, supplies, equipment, materials, repairs, or facilities hereunder shall be submitted to the United States for approval as to employment. Unless and until such agreements or arrangements have been approved by the United States, compensation paid to any interested or related company shall be subject to review and readjustment by the United States. In connection with such review and readjustment, the United States may deny reimbursement hereunder of any portion of such compensation it deems to be in excess of fair and reasonable compensation. The United States may also deny reimbursement, in whole or in part, of compensation under any arrangement or agreement with an interested or related company which it deems to be exorbitant, extortionate or fraudulent. The term "interested company" shall mean any person, firm, or corporation in which the General Agent, or any related company of the General Agent, or any officer or director of the General Agent or any employee of the General Agent who is charged with executive or supervisory duties, or any member of the immediate family of any such officer, director or employee, or any officer or director of any related company of the General Agent or any member of the immediate family of an officer or director of any related company of the General Agent, owns any substantial pecuniary interest directly or indirectly. The term "related company", used to indicate a relationship with the General Agent for the purposes of this Article only, shall include any person or concern that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the General Agent. The term "control" (including the terms "controlled by" and "under common con-

trol with") as used herein means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the General Agent (or related company), whether through ownership of voting securities, by contract, or otherwise.

Article 14. The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable.

Article 15. The United States shall, when it may legally do so, have the advantage of any existing, or future, contracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, or equipment, if this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the General Agent.

[fol. 115] Article 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third

persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

(b) In view of the extraordinary wartime conditions under which vessels will be operated hereunder, the General Agent shall be under no responsibility or liability to the United States for loss or damage to the vessels arising out of any error of judgment or any negligence on the part of any of the General Agent's officers, agents, employees, or otherwise. However, the General Agent may be held liable for loss or damage not covered by insurance or assumed by the United States as required under Article 8 of this Agreement, if such loss or damage is directly and primarily caused by willful misconduct of principal supervisory shoreside personnel or by gross negligence of the General Agent in the procurement of licensed officers or in the selection of principal supervisory shoreside personnel.

(c) In the event that the General Agent shall perform any stevedoring, terminal, ship repair or similar service for the vessels hereunder at commercial rates, the General [fol. 116] Agent shall have all the obligations and responsibilities of the person performing such services under the standard or other approved form of contract with the United States or, in the absence of such standard or approved form, under usual commercial practice.

(d) The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the General Agent whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities.

Article 17. Wherever and whenever herein any right, power, or authority is granted or given to the

United States, such right, power, or authority may be exercised in all cases by the War Shipping Administration or such agent or agents as it may appoint or by its nominee, and the act or acts of such agent or agents or nominee, when taken, shall constitute the act of the United States hereunder. In performing its services hereunder, the General Agent may rely upon the instructions and directions of the Administrator, his officers and responsible employees, or upon the instructions and directions of any person or agency authorized by the Administrator. Wherever practicable, the General Agent shall request written confirmation of any oral instructions or directions so given.

Article 18. (a) The General Agent warrants that it has not employed any person to solicit or secure this Agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this Agreement or in its discretion to deduct from any amount payable hereunder the amount of such commission, percentage, brokerage, or contingent fee.

(b) In any act performed under this Agreement, the General Agent and any subcontractor shall not discriminate against any citizen of the United States on the ground of race, creed, color or national origin.

Article 19. No person elected or appointed a member of or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account shall hold or enjoy this Agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. The General Agent shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

Article 20. Subject to the provisions of Article 5 hereof, this Agreement is in substitution of and hereby abrogates and replaces the so-called 1c Bareboat Charter Agreements relating to the assignment or allocation to the General Agent of the vessels listed on Exhibit A hereto from the dates stated on such Exhibit. Preference Agreements

relating to such allocated vessels shall be terminated and abrogated as of the same dates.

All rights and obligations of the parties under said abrogated Bareboat Charter and Preference Agreements are hereby cancelled and this Agreement is made retroactive to the cancellation dates thereof as stated on Exhibit A hereto. However, the General Agent shall be reimbursed for any expenditure made before the earliest permissible cancellation date after March 22, 1942, under said agreements to the extent that such expenditure [fol. 118] would have been considered in computing additional charter hire or freight under such agreements. This Agreement, unless sooner terminated, shall extend until six months after the cessation of hostilities.

In witness whereof, the Parties hereto, have executed this Agreement in triplicate the day and year first above written.

United States of America, By: E. S. Land, Administrator War Shipping Administration, By: R. W. Seabury, For the Administrator. Eichmann, Wright & Pugh, Inc., By: Saunders Wright. (Corporate Seal)

Attest:

Alan Smith, Secretary.

Approved as to form:

Frank J. Zito, Assistant General Counsel War Shipping Administration.

[fol. 119] EXHIBIT "A" TO CONTRACT WSA

Cancellation

Date of

Previous Bare-

boat Charter or

Date

Allocation Date of Preference

Date of

Vessel Approved Delivery Agreement, or both Redelivery

I, , certify that I am the duly chosen, qualified, and acting Secretary of

a party to this Agreement, and as such, I am the custodian of its official records and the minute books of its governing body; that

who signed this Agreement on behalf of said corporation, was then the duly qualified _____ of said corporation; that said officer affixed his manual signature to said Agreement in his official capacity as said officer for and on behalf of said corporation by authority and direction of its governing body duly made and taken; that said Agreement is within the scope of the corporate and lawful powers of this corporation.

_____, Secretary. (Corporate Seal)

CAA 4-4-42 (Part II)

Contract WSA-4098
Addendum No. 1

[fol. 120]

PART II

to

Service Agreement for Vessels of Which the War Shipping Administration is Owner or Other *Pro Hac Vice*

(Provisions Relating to Passenger Vessels.)

Whereas, the United States of America (Herein called the "United States") acting by and through the Administrator, War Shipping Administration, and Dichmann, Wright & Pugh, Inc. (herein called the "General Agent") entered into an Agreement (Contract WSA-4098) dated January 9, 1943 (herein called the "Service Agreement") whereby the United States appointed the General Agent as its agent to manage and conduct the business of cargo vessels assigned to it by the United States; and

Whereas, it is desirable to have as far as practicable both cargo vessels and passenger vessels operated under the uniform provisions of one agreement.

Now, Therefore:

The United States and the General Agent agree that passenger vessels heretofore or hereafter allocated to the General Agent to conduct the business of the vessels as agent of the United States shall be governed by the provisions of the Service Agreement modified as follows:

Section 1. Article 3A of the Service Agreement is hereby amended by adding a provision following subsection (e) thereof as follows:

[fol. 121] "(f) Shall arrange for the transportation of passengers when so directed, and issue or cause to be issued to such passengers customary passenger tickets. After a uniform passenger ticket shall have been adopted by the United States, such passenger ticket shall be used in all cases as soon as practicable after receipt thereof by the General Agent. Pending the issuance of such uniform passenger ticket, the General Agent may continue to use its customary form of passenger ticket."

Section 2. The vessels to which the Service Agreement will apply by operation of this Part II, are as listed on Exhibit B attached hereto and made a part hereof, and such additional vessels as may from time to time be assigned to the General Agent by letter agreement.

In witness whereof, the parties hereto have executed this Part II to the Service Agreement in triplicate this 30th day of July, 1945.

United States of America, By: E. S. Land, Administrator War Shipping Administration, By: Ross Langdon, For the Administrator. Diehmann, Wright & Pugh, Inc., By: Alan Smith, President.
(Seal)

Attest:

Joseph F. Trueschles, Secretary.

[fol. 122] Approved as to form:

George J. Hammerman, for Robert F. Donoghue,
General Counsel War Shipping Administration.

P. A. S.

J. P. D.

EXHIBIT "B" TO CONTRACT WSA-4098

Vessel	Date Allocation Approved	Date of Delivery	Date of Redelivery
Meteor	June 7, 1945	June 8, 1945	
District of Columbia	June 21, 1945	June 22, 1945	

[fol. 123-132] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

Appendix to Brief of Appellees

[fol. 133] INTERROGATORIES ADDRESSED TO DEFENDANT

Plaintiffs address the following interrogatories to the defendant, Eichmann, Wright & Pugh, Inc., a Delaware corporation, to be answered by its proper officer, under oath pursuant to Section 33 of the Rules of Civil Procedure:

1. Attach to the answer to this interrogatory a true copy of its service agreement with the War Shipping Administration, as owner of the steamship METEOR, dated January 9, 1943.

2. When and by whom was Lestus Barnes, alias Jack Lester Barnes, first employed by you?

3. How many officers and men are necessary to comprise the full complement of the steamship METEOR?

4. How many officers and men actually comprised your crew when the METEOR sailed from Norfolk on August 3, 1945?

[fol. 134] 5. How many officers and men were on actual duty on the early morning of August 4, 1945, at the time of the happening of the acts alleged in the complaint?

6. Attach to the answer to this interrogatory a floor plan of the steamship METEOR showing the location of rooms, crews quarters, promenade decks, galley, etc.

7. Did you actually pay the salaries and wages of the officers and crew of the METEOR, even though you may have been reimbursed with funds provided by the United States?

8. Did you actually collect the proceeds of the contract of passage for fare-paying passengers on the METEOR on the night of August 3, 1945?

9. As agent for the War Shipping Administration, did you offer, to the public in general, passage from Norfolk to Washington on said METEOR on the night of August 3, 1945, subject to pre-payment of established fares, provided said passenger was a law abiding citizen?

10. What was the temperature in Room 116 of said METEOR at 11 P. M. on the night of August 3, 1945, and, if the above cannot be answered by you, state what the average stateroom temperature was on said vessel at the time in question? If this last cannot be answered, state what temperature readings you have nearest to 11 P. M. on the night in question and where were said readings taken.

11. Attach to the answer to this interrogatory, a true [fol.135] copy of the log of said METEOR showing its trip from Norfolk to Washington on the night of August 3, 1945, and the early morning of August 4, 1945.

12. What was the location of the METEOR at 3 A. M. on the morning of August 4, 1945? In answering this question, state how far said METEOR was from the respective shore lines of Virginia and Maryland?

13. What complaints, if any, of alleged violence and/or robbery and/or unlawful entry into the staterooms of passengers, have you received notice of from the time you started as Operating Agent for the War Shipping Administration until the date of the alleged act in this case? In answering this question, state the nature of all such complaints on all vessels carrying fare-paying passengers?

14. Was there a screen provided for Room 116 on the METEOR on the night of August 3, 1945, and if so, where was said screen?

15. How many staterooms carrying fare-paying passengers were provided with screens on the night of August 3, 1945, on said METEOR?

16. How many staterooms, exclusive of Room 116, were not equipped with screens on said METEOR on the night of August 3, 1945?

17. State whether or not the bell signalling device from Room 116 was in proper working condition at 3:15 A.M. on the morning of August 4, 1945, on said METEOR. If your answer to the above is "Yes", state who was responsible for answering said bell and where was said person at the time stated?

[fol. 136] ANSWERS OF DICHMANN, WRIGHT & PUGH, INC., TO
INTERROGATORIES PROPOUNDED BY PLAINTIFFS

1. A true copy of the agreement with the War Shipping Administration as owner of the steamer METEOR is hereto attached.

2. On July 8, 1945, at Norfolk, Virginia, by Mills E. Bell.

3. The required crew consisted of 16 in the Deck Department and 12 in the Engine Room Department, and authority for a non-navigating personnel up to 42 as needed.

4. A Deck crew of 21, an Engine Room crew of 16, a Steward personnel of 40, and 2 Purser. In addition 2 shore patrolmen of the Navy.

5. 15.

6. Defendant is making every effort to locate a floor plan and will file the same as soon as possible by agreement of counsel.

7. Funds for the payment of salaries and wages of the officers and crew of the steamship METEOR were furnished by the United States and not advanced by this defendant.

8. The proceeds of contracts of passage for fare-paying passengers on the METEOR on the night of August 3, 1945 was collected by the Washington-Hampton Roads Line as were all other proceeds of passage and kept in its account.

9. Yes, as agents only.

[fol. 137-148] 10. A search of all available records fails to disclose any record of the temperatures aboard the vessel.

11. It has not been possible to locate the log of the METEOR in time to supply a copy thereof at the time of filing this answer. However, the effort to produce the log is being continued, and it is hoped and expected that this information will be available at a later date.

12. At the time in question the METEOR was six-tenths of a mile from the Maryland shore, and one and two-tenths of a mile from the Virginia shore.

13. Defendant states that this interrogatory is immaterial and irrelevant. However, it says there were no complaints of the nature stated.

14. If plaintiffs meant by the interrogatory to designate the usual wire mesh screens for keeping out insects, there were none.

15. None.

16. No fare-paying passenger staterooms were equipped with such screens.

17. The bell signalling device was in good order and condition.

18. If rung it would be answered by the bell boy on duty on the saloon deck.

[fol. 149] (R. 90)

DR. CHARLES H. PETERSON, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

[fol. 150] Examined by Mr. Hoffman:

Q. Your full name is Charles H. Peterson?

A. Yes, sir.

Q. What is your occupation?

A. Physician.

Q. Where were you educated?

A. University of Virginia.

Q. Where do you now practice?

A. Roanoke, Virginia.

Q. How long have you been in continuous practice counting the time you served in the United States Navy?

A. Twenty-one years.

Q. Doctor, on August 3, 1945, where were you stationed?

A. I was stationed at the United States Naval Hospital, Naval Operating Base, Norfolk, Virginia.

Q. What was your rank?

A. I am commander in the United States Naval Reserve.

Q. Dr. Peterson, on the night of August 3, 1945, where were you going?

A. I was taking a patient from the Naval Hospital in

Norfolk, Virginia, to the Naval Hospital at Bethesda, Maryland, traveling under orders.

Q. And what was your mode of transportation?

A. I was traveling on the river line's METEOR.

Q. Is that the boat that was traveling between Norfolk and Washington, D. C., at that time?

A. Yes, sir.

[fol. 151] Q. It is commonly called the Norfolk-Washington Line?

A. Yes, sir.

Q. And that boat was due to arrive in Washington, D. C., when?

A. It was due to arrive there on the morning of August 4.

Q. Doctor, do you remember the approximate time of the arrival of the boat?

A. No, I couldn't estimate that very well.

Q. Now, Dr. Peterson, what were the weather conditions on that particular night?

A. It was a very hot night—very sultry.

Q. Was there much circulation of air at all?

A. In the cabin that I occupied it was necessary to leave the door ajar in order to get sufficient ventilation.

Q. Did you prop that door by some article?

A. Yes, sir.

Q. You do not know how the doors of the rest of the cabins were left, do you?

A. No, I do not.

Q. On the night in question, or rather the early morning of August 4, were you awakened, and if so, by whom?

A. About four o'clock in the morning I was awakened by a shore patrolman.

Q. And where did he instruct you to go, or request you to go?

A. He said the captain wanted to see me at once to examine a patient for him.

[fol. 152] Q. Where did you go?

A. I went to an inside stateroom on the second deck, and I believe the number was 116.

Q. Was it an inside or outside stateroom?

A. Inside stateroom.

Q. Are you positive it was an inside stateroom, Dr. Peterson?

° A. No, it was an outside stateroom, and the door opened to an inside passage.

Q. In other words, you mean that the window looked out over the water, but that you entered the room from an inside deck?

A. Yes, sir.

Q. Doctor, whom did you find in stateroom No. 116?

A. I found two ladies there, each about in their fifties, I would say.

Q. Did you know those ladies prior to this particular night?

A. No, I did not.

Q. I hand you a picture of a lady, and will ask you whether or not you can now identify that lady?

A. (Witness looking at picture) Yes, sir; this was the lady in the lower bunk.

Q. Do you know now what her name is?

A. I can never remember the woman's name—wait a minute—

Q. Doctor, what was the condition of the lady when you first saw her?

A. She was quite nervous and upset, but not hysterical; she had multiple bruises across her entire throat, and these were worse on the left side of her throat; she also had a [fol. 153] large bruise under the left eye, and when I arrived there she was holding a wet towel to this region; she also had extensive subconjunctival hemorrhages of both eyes, and this was worse on the left side. Her eyes were protruding.

Q. Were you also asked to examine any other portion of her body?

A. Yes, sir, I examined her genitalia and these were quite moist, but there was no bleeding.

Q. Can you state what in your opinion caused the hemorrhages of the eyes?

A. It would have been quite evident to any physician, regardless of his specialty, that this woman had been almost choked to death."

(R. 95-96)

Q. Dr. Peterson, I hand you here Plaintiffs' Exhibit A, and will ask you to take the picture and tell us whether or not you can identify the black spots that appear on the neck and top portion of the breast?

A. These black spots were due to bruises both on the neck and upper chest, and also on the face.

Q. Those bruises which show as black spots on the picture are easily discernible?

A. Yes, sir.

[fol. 154] Q. Doctor, does this picture, itself, correctly portray the appearance of this lady at the time you saw her?

A. Yes, Mr. Hoffman, it does in one respect, but in another respect a Kodachrome would have given a better idea.

Q. Can you clarify that statement, when you say, "Kodachrome would have given a better idea"? What do you mean?

A. It would have shown the injuries in color, and would have given a better idea of the actual extent of the injuries sustained, which were actually very much more extensive than this picture shows.

Q. From what part of the lady's neck from one side to what part on the other side did the bruises appear, from your examination?

A. The bruises ran across the entire throat—the bruises actually ran from ear to ear.

Q. Now, Doctor, what treatment, if any, did you give to the lady whom I refer to as Mrs. Weade, although you do not remember her name?

A. I secured an enema bag from the purser on the ship, and also some lysol, and instructed her to take a douche.

Q. You did not, I believe, actually administer that douche yourself?

A. No, I did not.

Q. What other treatment, if any, did you give to Mrs. Weade and her companion in the stateroom?

A. I gave them each a sedative to quiet them, and had [fol. 155] all of the linen changed. The bunks were remade, and I left them about 5:30 a.m.

Q. In connection with the linen that you may have seen in the lower bunk, can you state what the condition of the linen was when you arrived?

A. There was a large moist spot in the central portion of the sheet on the lower bunk; the top sheet and counterpane had been pushed to the bottom of the bunk, and the entire bottom portion of the bunk was covered with dirt; and it looked as if someone had been on the bunk with shoes on.

Q. What did you do with that particular linen that was soiled?

A. I folded it carefully from outside in and took it off altogether and placed it in the passage-way outside of the cabin door.

(R. 97, 98, 99)

Q. When you arrived at the stateroom, what was the condition of it? State whether or not there was a screen in the window?

A. I didn't see a screen in it.

Q. Doctor, would giving a lysol douche, assuming it was given necessarily to remove any male spermatozoa, if male spermatozoa in fact, was inside the vagina?

A. Such a douche would help do this, but not necessarily remove all of the spermatozoa. I don't know how thorough the douche was that she took.

(R. 100)

[fol. 156-178] By Mr. Funkhouser:

A. My question is, Did they show any effects of being hysterical?

A. They showed no signs of being hysterical or in any way what you might call silly or foolish about the thing that had occurred. I mention this in my statement, as Mr. Funkhouser has said, to emphasize the impression which I had, in spite of what these two women had gone through,

they were well composed, cooperative, and showed signs of what I would call "good breeding and self-control."

By Mr. Hoffman:

Q. Doctor, is there any question in your mind, from your personal examination and observation of Mrs. Weade, as to whether or not she had sustained physical injuries only a short time prior to the time you examined her?

(R. 103)

A. No question in my mind at all.

Q. Can you state whether or not she did sustain physical injuries prior to your examination of her?

A. Extensive physical injuries."

[fol. 179-211] (R. 184)

GEORGE C. HUDGINS, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Examined by Mr. Hoffman:

Q. And one Jack Lester Barnes, the Negro who has been referred to in this trial, was a member of that ship's crew on that particular morning, was he not?

A. Yes, sir.

Q. Did you employ him?

A. He was employed by the steward of the ship at that time.

Q. Who was the steward?

A. A man by the name of Bell.

[fol. 212] (R. 254)

ALLEN SMITH, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Breedén:

A. We took over the whole staff of the Norfolk & Washington Steamboat Company which had been operating this service before. We took over the whole staff, except Mr.

Norman, who was the president, and Mr. Sawyer, who was the engineer, and one other I have forgotten.

Q. In other words, your company stepped into the shoes of the Norfolk-Washington line and just took everyone over, except the top executives?

A. That is correct.

Q. And you ran that line and directed its operation, both in a general way and responsible for the details?

A. Yes.

(R. 372)

Q. Now, by the same token, you would not have hired bad employees; isn't that true?

A. Not unnecessarily.

Q. But you were pretty rushed at the time; that is the situation, isn't it?

A. Yes, that is right.

Q. Now, can you tell us whether at any time any inquiry was made before Jack Lester Barnes was put to work in the galley of the METEOR, by anyone in your employ?

[fol. 213] A. That I cannot tell you because, I believe he was taken in Norfolk here at the time and I was in Washington. However, some of the staff may be able to tell you.

Q. Do you know of, in your position as president of the line, or did you ever direct, as such president, a safeguarding system of inquiry with respect to employees on your passenger line? If you know, Mr. Smith—

A. All I can say is this, Mr. Breeden, as I said before: that the precautions taken by the Government, the Coast Guard and the Merchant Marine, when a strange man came to us, was about the most we had to rely on. Certainly we could not write to the forty-eight states and the F.B.I. and sail a ship every night from both ends of the line. Now, if we found any man who did not perform his duty properly, we let him go without the slightest ceremony at all.

Q. Mr. Smith, what you are saying, if I understand you in that all-inclusive statement, is that you used the same care and precaution for putting a man on the METEOR, that was hauling the general public and among them unattended ladies, such as the plaintiffs here, as you did on a ship hauling cattle or general merchandise?

A. No, no. We did differently from that.

Q. Now, what did you do differently? What did you do in employing Barnes that you did not do in employing a seaman on a merchant ship, if you know, Mr. Smith? Maybe that came below your—

A. Of course, you see, when you employ a cook on a ship you want a man that can cook—

[fol. 214] Q. I beg your pardon. I don't want to mislead you. I don't mean that when you wanted a cook you hired an oiler or a wiper or a fireman, but I don't think the system used in employing them was any different.

A. I can only say, in the case of this man, who had been previously handled by the governmental agencies, that we took their investigation as sufficient.

Q. Do you have the investigation that was made by these other agencies as to this Negro man?

A. No. When he came down with a slip from the pool and his certificate from the Coast Guard, that was sufficient.

Q. Do you know the day he was employed—the date of it?

A. No, I can't say that I do.

Q. Now, it is also true that after he was employed, if I understand you correctly, if a man could not perform his duties, you fired him?

A. That is right.

Q. But after he was employed for the period of time—I think roughly a month—that he was on the vessel, during all that time you didn't find it possible, or at least you didn't make any inquiry at all as to his reputation, the integrity of the man, or his tendencies, whether they were criminal or otherwise, and let him continue as a member of the ship's crew?

A. I would say no.

(R. 273, 274, 275, 276)

Q. I understand that. Now, of course, it left something [fol. 215] there for Dichmann, Wright & Pugh, didn't it?

A. What do you mean?

Q. I mean this was not a free service. In discussing the operation of this line, the compensation of Dichmann, Wright & Pugh had to be paid, of course?

A. Yes.

Q. And some part of that money was retained by you as agency fees, or profits, or whatever—

A. No; we could not draw checks to our own order.

Q. Who drew those checks, and how frequently were they drawn?

A. Well, that all depended on a matter of audit, but the agreement provided that any check for compensation should be signed by one of the auditors of the War Shipping Administration.

Q. Was that drawn on this same account?

A. I believe—yes, it was.

Q. And when you say according to an audit, that was for the purpose of determining how much you were to get; is that correct?

A. No.

Q. Suppose you just explain that to us, and how those checks were drawn.

A. Periodically these accounts were assembled for the purpose of getting the revolving fund back into the position in which they wanted it kept. They had a field auditor in Baltimore and one in Washington. That auditor would visit the office and go over the accounts and then draw or give us authority to draw—I am twisted—he would then [fol. 216] draw on the U. S. Treasury through the Accounting Department of the War Shipping Administration to refund us for that amount. So far as our own compensation was concerned, the check would be drawn, but would have to be signed by the field auditor.

Q. Would it be drawn on this account?

A. I believe so, Mr. Breeden, but I can't be positive of that.

Q. Just for example, what were those checks for?

A. As a matter of fact, now I come to think of it, checks for our own compensation were drawn on the bank account in Baltimore.

(R. 278, 279)

Q. Mr. Smith, I hand you Plaintiffs' Exhibit 2 and ask you if you will look at the contract attached to the exhibit, dated January 9, 1943, and ask you whether that contract was signed by you on behalf of Diehmann, Wright & Pugh?

A. Yes; it was signed by Saunders Wright as president, and my signature there was attesting to his.

Q. And also signed by the War Shipping Administration?

A. That is right.

Q. Was that contract performed throughout by your company?

A. Yes, sir.

(R. 297, 298)

Q. And the other signatory to the contract, the War [fol. 217] Shipping Administration, did they perform it on their part in its entirety?

A. Yes, sir.

Q. Now, Mr. Smith, you had a watchman by the name of Mr. Adkins; how was he employed?

A. He was employed through the same sources that we employed the other men.

Q. Mr. Smith, I want to ask you whether or not, during the time now in question here today, the METEOR was operated under what is known as General Rules and Regulations for Vessel Inspection, Bays, Sounds, and Lakes other than Great Lakes, dated August, 1944, promulgated by the United States Coast Guard?

A. We operated under Coast Guard regulations.

Q. And they were adhered to and you were required to adhere to them at all times?

A. That is right.

(R. 299)

(R. 311)

GEORGE C. HUDGINS, recalled as a witness for the defendant, further testified as follows:

Mr. Hoffman: If Your Honor please, we desire to offer in evidence in connection with Captain Hudgins' testimony only the paragraph 96.23 as stated in General Rules and Regulations for Vessel Inspection, Bays, Sounds, and Lakes other than the Great Lakes, under [fol. 218] date of August, 1944, as issued by the United States Coast Guard, Captain Hudgins having testified

that he operated under that; this one paragraph which deals with the captain, watchmen, and fire patrolmen only.

Mr. Seawell: That is all right, sir.

Mr. Hoffman. (Reading:)

"Vessels carrying passengers shall during the night time keep a suitable number of watchmen in all passenger quarters and on each deck. All watchmen shall be under the direct charge of the master or officer in command of the vessel and they shall report to the officer in command at the pilot house at fixed intervals of not longer than every hour. Cabin watchmen and cabin patrols on duty in the night time on all vessels shall have in their possession while on such patrol duty a suitable and efficient dry battery flashlight. The uniforms of the night watchmen shall be so conspicuous as to be readily distinguished from other persons, and the coat or sweater marked with a rating badge worn on the left sleeve, marked 'Watchman', and front of cap marked 'Watchman.' Watchmen or patrolmen shall not be required to perform any other duty while on watch. On all passenger vessels having private or stateroom accommodations for passengers there shall be maintained while passengers are on board an efficient fire patrol, so as to completely cover all parts of the vessel accessible to passengers or crew at 20-minute intervals between the hours of 10 p.m. [fol. 219] and 6 a.m., except machinery spaces, occupied passenger or crew sleeping accommodations, and cargo compartments which are inaccessible to passengers or crew while the vessel is being navigated. Failure of a patrolman to follow a prescribed course or to record each station within a definite time shall be entered on the record, along with the reason for the irregularity. The patrolman shall report to the bridge every hour on vessels where the fire patrol system is not equipped with a recording apparatus in the control stations. On vessels requiring more than one patrol route, one patrolman may contact the others and make a general report to the bridge. A patrolman while on duty shall have no other task assigned to him, but shall be provided with a flashlight and shall wear a distinctive uni-

form or badge. In case of vessels of non-inflammable construction which are provided with a number of automatic fire detecting stations, the patrol throughout the entire patrolled area may be at one-hour intervals."

(R. 339, 340, 341)

(R. 360)

CHARLES ADKINS, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Hoffman:

Q. Mr. Adkins, as I understand it, prior to the time [fol. 220] that you started riding on the METEOR you had had no experience in sea duties, either as watchman or otherwise?

A. No, sir.

Q. And had had no experience as watchman on land, as a matter of fact, had you?

A. No, sir.

Q. When you first went on the METEOR, it is true that you were then riding as an employee of one Carlin; isn't that correct?

A. Yes, sir.

Q. And Mr. Carlin was the owner of the slot machines that were put on the boat; isn't that right?

A. That's right.

Q. And you are a mechanic that can fix slot machines and regulate them; is that correct?

A. That's right.

Q. In that connection, when you started riding the boat, you were then just a passenger that paid for a stateroom, were you not?

A. Well, when I first went on the boat. I think the boat—I was not on the boat the first trip of the boat, but the second trip, Mr. Carlin called me in Norfolk. The boat had run into a storm up here and he had some console slot machines on there that were broken up in the storm. He asked me if I would be willing to repair the machines. He wanted me to repair the machines while the boat was in dock. I went over and looked at the machines and told him that the machines could not be repaired in dock that

say, that it would take some time to repair them, so he asked me if I could make two or three trips on the boat [fol. 221] and repair them, which that is what I did.

Q. And when you were making those trips, did you pay passage, or just a stateroom charge?

A. Mr. Carlin paid all my expenses.

Q. In other words, you don't know whether he paid for a ticket or anything?

A. I do not.

Q. You occupied a passenger stateroom, did you not, on those trips?

A. That's right.

Q. Now, how long did you continue to ride the METEOR that way before you were employed by them?

A. I imagine two weeks.

Q. Then, how did it come about that you secured employment with Dichmann, Wright & Pugh?

A. Well, Mr. Carlin gave me—after the machines were repaired, they were in good shape, he asked me if I would like to represent them as far as making the collection from the machines and repairing the machines, and it was very interesting to me, so I took the job.

Q. At the time of this particular incident, then, you were actually working, not only for Dichmann, Wright & Pugh as a saloon watchman, but also for Mr. Carlin, and you received compensation from both sources?

A. I did, but I made the collections on the mornings after the ship had docked.

Q. On the mornings after the ship had docked?

A. I made the collections.

Q. Suppose a slot machine got jammed up en route; [fol. 222] would you fix it?

A. Mr. Rosenberg would plug the machine up, turn it to the wall.

Q. You made no effort to fix the machines then?

A. I received instructions from the shipping company that I was not supposed to engage in repairing the machines while I was on duty for them.

Q. Now, when you were employed, Mr. Adkins, you were not obtained from any shipping pool, or anything like that, were you? You had gotten to know them on the boat and they knew you, and they just employed you because they knew you; isn't that right?

A. Well, Captain Hudgins hired me. I had a good record.

Q. But he didn't go to a shipping pool to get your name? He already knew you; isn't that correct?

A. That's right. I had to get my papers first, before I could get into their employment.

Q. And the paper consisted of a certificate from the Coast Guard?

A. I got two certificates: A seaman's certificate and another certificate. I have the certificates in my pocket.

Q. Whom did you turn the proceeds of the slot machines over to?

A. Mr. Rosenberg and I checked the machines together, and all the proceeds went to them and they mailed us a check once a month.

Q. Went to Mr. Rosenberg, of Dichmann, Wright & Pugh?

A. That's right.

Q. Now, as a matter of fact, your duties as saloon watch-[fol. 223] man hardly ever took you up on the boat deck or the gallery deck unless you heard some disturbance up there; isn't that correct?

A. Well, I had instructions from Captain Hudgins, also from Captain Goode, that I was to patrol inside and outside of both decks.

Q. And were you patrolling inside and outside of both decks on this particular night?

A. When I reported to the bridge to Captain Hudgins, I always went around that way.

Q. And how often did you report to the bridge to Captain Hudgins that night?

A. Well, I don't remember any particular night; I mean, that night in particular, but I think I reported about every hour.

Q. Certainly you remember this night, if you ever remembered any night; isn't that true?

A. No. Well, I always made it a point to report to the bridge every hour. I don't remember this one particular night. I just know that I always reported every hour. I don't recall any particular—

Q. And you don't remember whom you reported to on this particular night?

A. Yes; I reported to Captain Hudgins.

Q. You reported to Captain Hudgins each hour?

A. No, not after he had gone off—Captain Goode—up until then.

Q. How many times, then, did you actually patrol the outside of that boat deck or gallery deck?

A. How many times?

Q. That night.

A. Well, just before this happened, I had been up and [fol. 224] brought some chairs in from up there; about every 20 or 30 or 40 minutes, all around, all over the decks.

Q. And you brought the chairs in at about 3 o'clock, did you not, in the morning?

A. About that time, I imagine.

Q. And then you sat down for approximately 30 minutes, did you not?

A. No, I don't think I had been sitting that long; I might have.

Q. Well, 20 or 30 minutes?

A. I might have been sitting that long; I don't remember.

Q. But you know it was at least 20, don't you?

A. Fifteen or 20 minutes, I would say.

Q. When you testified in the case of State of Maryland against Jack Lester Barnes, you said you sat there for approximately 20 or 30 minutes, "I wouldn't say exactly"; that is correct, isn't it?

A. Something like that. If I made that statement, it must be pretty well correct.

Q. And certainly during that time you were not patrolling any part of the boat, were you?

A. I had just come off of patrol; I mean, I had just been up on the other deck.

Q. Mr. Adkins, do you think that you were sufficiently fulfilling the duties of a patrolman to just make a patrol about once an hour and then sit down for 30 minutes.

A. Well, I didn't sit down that long.

Q. Well, 20 or 30 minutes?

A. Yes.

[fol. 225] Q. I say, do you think that you are sufficiently performing the duties of your job as watchman on the METEOR when you make a round and then sit down for 20 or 30 minutes?

A. Well, I could observe any noise or see most every part of the ship from where I was sitting.

Q. You could see the outside of the boat deck then?

A. No, I couldn't see the outside, but I had just been up there?

Q. Where was Mr. Sharlash when this happened?

A. Who?

Q. Your superior officer.

A. Sharlash.

Q. How do you spell that, if you know?

A. S-h-a-r-l-a-s-h.

Q. Where was he?

A. He was in his room; went down for a smoke; he smoked a pipe.

Q. How long had he left you?

A. Well, I imagine Phil had been down there for an hour or so. He always read and he smoked his pipe before he retired.

Q. He was off duty, then, at that time, wasn't he?

A. Yes, officially he was off duty.

Q. In other words, you were the only saloon watchman on duty at that time; isn't that correct?

A. Well, I wouldn't necessarily say I was the only one. He worked overtime himself. He was always ready to cooperate with me at any time.

Q. Oh, I appreciate that, but at this particular time, 3 [fol. 226] a.m., on the night of August 4, 1945, when, you say, Mr. Sharlash was down in his room and had been down there for over an hour, and he was officially off duty, then you were the only saloon watchman on duty after that particular time; isn't that correct?

A. That's right.

Q. Now, who was the deck watchman on duty?

A. I don't know.

Q. Did you see him around that night?

A. I had seen him going through with the clock.

Q. Punching the clock?

A. Uh-huh.

Q. But he was not supposed to go up on the gallery deck at all, except to punch the clock, isn't that right?

A. I don't know.

Q. You don't know?

A. I don't know. I just know what my duties were.

Q. The Shore Patrol were asleep at the time? You awakened them after this incident; isn't that correct?

A. I don't know whether they were asleep; they were in their room.

Q. And there were doors all over the place that were cracked open, weren't there?

A. No, sir.

Q. There were not?

A. No, sir.

Q. Captain Hudgins said there were.

A. I can't help what Captain Hudgins said.

Q. Did you observe any other doors open?

[fol. 227] A. Not on that deck, the boat deck, I didn't.

Q. Now, you say that the young boy, Culpepper, came out and asked if you were the watchman?

A. That's right.

Q. What did you have on that night?

A. I had on a blue uniform coat and an officer's hat.

Q. Did it have "Watchman" printed over it?

A. We had a badge, yes, which did have "Watchman."

Q. You were wearing a hat, were you?

A. Yes, sir.

Q. He just failed to observe the fact that it said "Watchman"?

A. I think maybe it said "Watchman."

Q. Well, if it said "Watchman," why should he ask you whether you were the watchman?

A. Well, he didn't come all the way up to me; he was about middleways of the saloon deck.

(R. 365, 366, 367, 368, 369, 370, 371, 372, 373, 374)

Q. Mr. Adkins, the lounge chairs that you had brought into the inside of the boat were on the boat deck. Now, were they on the forward end of the boat or the aft?

A. The aft end.

Q. And when you brought the chairs in, you then sat down in the aft end of the boat, didn't you?

A. The aft end on the saloon deck.

[fol. 228] Q. And you sat down on a studio couch there?

A. That's right.

Q. Is stateroom 116 in the middle of the boat, or where?

A. No, it is not in the middle; it is not in the middle.

Q. Well, we, unfortunately, don't have a plan here, so I thought perhaps you could tell us where it was.

A. Well, it is not in the middle.

Q. Well, I heard that. Is it near the aft end, or near the forward end?

A. It is near the aft end.

Q. And how many staterooms intervene between the aft end and stateroom 116?

A. I don't know.

Q. How many decks were there on the boat?

A. Decks?

Q. Yes, sir.

A. Three, I imagine.

(R. 375, 476)

[fol. 229] PROCEEDINGS IN THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5696

DICHMANN, WRIGHT & PUGH, INCORPORATED, a Delaware
Corporation, Appellant,

versus

LILLIAN A. WEADE, FREDERICK M. WEADE, and ROBERTA L.
STINEMEYER, Appellees

Appeal from the District Court of the United States for
the Eastern District of Virginia, at Norfolk

November 25, 1947, the transcript of record is filed and
the cause docketed.

Same day, the original exhibits are certified up.

Same day, 2 orders extending the time to and including
November 25, 1947, within which to file record are filed.

November 29, 1947, the appearance of Leon T. Seawell is
entered for the appellant.

Same day, the appearance of Edw. L. Breeden, Jr., and
Walter E. Hoffman is entered for the appellees.

December 8, 1947, statement under section 3 of rule 10
is filed.

[fol. 230] STATEMENT OF POINTS INVOLVED ON APPEAL—
Filed December 8, 1947

[Style of Court and Title Omitted]

The appellant hereby designates the following points
which it will urge as being involved on the appeal in this
cause, and the manner in which they are raised in the
record:

1. There was no diversity of citizenship as between the
plaintiff, Roberta L. Stinemeyer, and the defendant, Dich-
mann, Wright & Pugh, Inc. This is set up in the third
paragraph of the answer.

2. The Court erred in admitting the photographs of Mrs.
Weade taken on the morning of the arrival of the steamer
in Washington, D. C. These photographs, which were en-
larged, were prejudicial and unduly tended to excite the

jury. This is raised by objections to the introduction of the photographs especially at pages 14 and 15 of the transcript.

3. The verdicts as rendered were excessive. These verdicts appear at pages 368 and 369 of the transcript, and the objection as to the amount was raised by one of the assignments named in our motion to set aside the verdict which appears at page 370 of the transcript.

4. The second cook on the steamer Meteor, Jack Barnes, was not an agent, servant or employee of the defendant, [fol. 231] Diekmann, Wright & Pugh, Inc., for whose acts it was liable, but under the contract between the defendant and the United States was an employee, agent and servant of the United States. This is shown by the General Agency Agreement which was marked as Plaintiff's Exhibit i, page 3 of the transcript; was asserted as a defense in paragraph 6 of the answers to the complaints; was raised as one of the grounds in our motion to direct a verdict for the defendant, found at pages 211 and 343 of the transcript, and the discussions following those pages; by the instruction which was refused by the Court, and by the exceptions made to the Court's charge, especially at page 364; and lastly upon our motion to set aside the verdicts found at pages 369 and 370 of the transcript, and the argument on the re-hearing.

5. The method of procurement of men for employment by the United States under contract and the difficulties of the situation. This is shown by the General Agency Agreement, plaintiff's Exhibit 1 at page 3 of the transcript, especially Article 3-A (d), and also by the testimony of Captain G. C. Hudgins, Alan Smith and Mills E. Bell.

6. The Court erred in failing promptly to declare a mistrial on motion of the defendant, following the question concerning insurance and indemnity as asked before the jury by attorneys for plaintiffs. These appear in the [fol. 232] question asked by plaintiff's counsel of the witness Alan Smith at pages 246 and 247 of the transcript; our motion for a mistrial thereon at page 247, and the discussion between counsel and the Court on the following pages; it also appeared in our motions at pages 341, 342 and 343 of the transcript wherein our motions to declare the mistrial were repeated.

7. The Court erred in its failure to grant the motions of defendant and direct a verdict for the defendant. This appears at pages 211, 243 and 370 of the transcript wherein our motions were made and the grounds therefor assigned.

8. The Court erred in refusing to grant the motion of the defendant to set aside the verdicts and enter judgments for the defendant, or grant a new trial. This appears at pages 369 and 370 of the transcript wherein the grounds for said motion were set forth.

9. The Court erred in its charge to the jury, especially in the following particulars:

(a). That under the contract between Dichmann, Wright & Pugh, Inc., and the War Shipping Administration, the steamer Meteor was being operated by the United States of America—War Shipping Administration, and that the United States of America and not Dichmann, Wright & Pugh, Inc. was the employer of Jack Barnes for whose act, [fol. 233] if guilty, the United States was solely responsible. This not only appears in the instruction requested by defendant and refused by the Court, but also appears at page 364 of the exceptions to the Court's charge.

(b) The Court erred in its charge with reference to the question of insurance being placed before the jury, and its statement to the jury a day after the offer of evidence did not cure the situation; and also that the court's questioning of the jury on the subject emphasized it in the minds of the jury instead of curing it. This not only appears in the instruction requested by defendant and refused by the Court, but also appears at page 365 of the exceptions to the Court's charge.

(c) The court erred in failing to charge as requested by defendant that in order for the defendant in any event to be held liable, the employee Barnes at the time of committing the act must have been acting within the scope of his employment and in the line of his duty. This was set forth in the instruction requested by the defendant and refused by the Court, also by the exceptions to the Court's charge especially at page 365.

(d) The Court erred in failing to charge as requested by defendant that there was no contract of carriage between the plaintiffs, Mrs. Weade and Mrs. Stinemeyer, and the

[fol. 234] defendant, Diehmann, Wright & Pugh, Inc., but that the evidence as shown by the tickets introduced was to the effect that the contract of carriage was between plaintiffs and the Washington-Hampton Roads Line operated by the United States of America—War Shipping Administration. This was set forth in the instruction requested by the defendant and refused by the Court, also by the exceptions to the Court's charge especially at page 365. The Court further erred in holding that the defendant was a common carrier.

10. The plaintiff, Frederick M. Weade, was not entitled to recover any damages in this action by virtue of the provisions of the Virginia Statute, Section 5134. This point was raised in paragraph 4 of the answer to the complaint of Frederick M. Weade, and involves the right of a husband to maintain an action under the Virginia Statute where the wife has instituted an action on her own behalf. This was also raised by the instruction requested by the defendant and refused by the Court, and exception to the Court's charge at page 366.

11. The plaintiff, Roberta L. Stinemeyer, was not entitled to recover any damages, there having been no attack made upon her and no injury sustained by her. This was raised by the answer to the complaint and is based upon the fact that under the law there can be no recovery for mental anguish or fright unconnected with any physical [fol. 235] injury or harm. Also that the evidence of her own doctor disclosed that she suffered no injury by reason of the occurrence, but that her condition was due to other and natural causes. This was also raised by instruction requested by the defendant and refused by the Court and exceptions to the Court's charge.

12. The contributory negligence of the plaintiffs Weade and Stinemeyer barred any recovery by them. This based upon the failure of plaintiffs to heed the warning posted in the stateroom occupied by them to close the shutter to the window, but they left not only the door to the stateroom open, but the window open. See the answers of plaintiffs to interrogatories No. 3 and 4; the testimony of Mrs. Weade at pages 193, and 206; and of Mrs. Stinemeyer at pages 157, 158 and 182 of the transcript.

Hughes, Little & Seawell, Attorneys for Appellant.

[fol. 236] ORDER CONTINUING CASE TO THE APRIL TERM, 1948
—Filed December 10, 1947

[Style of Court and Title Omitted]

Upon the application of counsel for the Appellant, consented to by counsel for Appellees, and for good cause shown,

It is ordered that the above entitled case be, and the same is hereby, continued from the January term to the April terms, 1948.

John P. Parker, Senior Circuit Judge.

December 9th, 1947.

March 15, 1948, brief and appendix on behalf of the appellant are filed.

March 31, 1948, brief and appendix on behalf of the appellees are filed.

Argument of Cause

April 5, 1948, (April term, 1948) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

April 15, 1948, reply brief and appendix on behalf of appellant are filed.

ORDER GRANTING LEAVE TO UNITED STATES TO FILE BRIEF AS
AMICUS CURIAE—Filed April 20, 1948

[Style of Court and Title Omitted]

On Consideration of the request of The Attorney General of the United States, and for good cause shown,

[fol. 237] Leave is hereby granted the United States to file twenty-five printed copies of brief in the above entitled case as *amicus curiae* within 10 days from this date.

John J. Parker, Senior Circuit Judge.

April 19, 1948.

April 30, 1948, brief on behalf of the United States as *amicus curiae* is filed.

[fol. 238]

OPINION—Filed May 13, 1948

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5696

DICHMANN, WRIGHT & PUGH, INCORPORATED, a Delaware
Corporation, Appellant,

versus

LILLIAN A. WEADE, FREDERICK M. WEADE, and ROBERTA L.
STINEMEYER, APPELLEES.Appeal from the District Court of the United States for
the Eastern District of Virginia, at Norfolk. At Law.

Argued April 5, 1948. Decided May 13, 1948

Before Parker, Soper and Dobie, Circuit Judges

Leon T. Seawell (R. M. Hughes, Jr., on brief) for Appellant; Walter E. Hoffman (Breedén & Hoffman; Michael F. [fol. 239] Keogh and Edw. L. Breedén, Jr., on brief) for Appellees; and H. G. Morison, Assistant Attorney General, J. Frank Staley and Leavenworth Colby, Special Assistants to the Attorney General, on brief, for The United States of America as amicus curiae.

DOBIE, Circuit Judge:

In civil actions before a jury in the United States District Court for the Eastern District of Virginia verdicts were returned and judgments entered in favor of the plaintiffs (appellees herein). Lillian Weade recovered judgment for \$50,000; Frederick Weade (her husband) for \$1,000; and Roberta Stinemeyer for \$5,000. The defendant, Dichmann, Wright & Pugh (hereinafter called Dichmann) has appealed to us.

On August 4, 1945, Mrs. Weade and Mrs. Stinemeyer purchased tickets at Old Point, Virginia, and there embarked on the steamboat Meteor, bound for Washington. About 11 p.m. they retired in stateroom 116, Mrs. Weade occupying the lower berth and Mrs. Stinemeyer the upper berth. The weather was warm so the door of the stateroom was left ajar and the window looking out upon the boat deck was opened. About 3 o'clock in the morning, a negro named Jack Barnes, second cook on the Meteor, entered the

stateroom through the window, raped Mrs. Weade and left the room by the window. Barnes was subsequently tried, convicted and executed.

The Meteor was owned by the United States and had been requisitioned through the War Shipping Administration. [fol. 240] On January 9, 1943, the War Shipping Administration entered into a contract with Dichmann, Wright & Pugh, Incorporated, for the operation by Dichmann of vessels assigned to it. On July 30, 1945, by a supplemental agreement the Meteor was added to the list of vessels assigned to Dichmann.

This contract of January 9, 1943, was designated "Service Agreement for vessels of which the War Shipping Administration is owner or owner *pro hac vice*." We quote two of the most important articles of this contract:

"Article 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time."

"Article 3A (d) The General Agent shall procure the Master of the vessels, operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

[fol. 241] The verdicts were rendered by the jury under a charge by the District Judge:

"Under the law of this case, by virtue of the contract which I have referred to, the defendant, Dichmann,

Wright & Pugh, is what is known as a common carrier or engaged in business as a common carrier, perhaps is more correctly the case, and by virtue of having purchased tickets and boarded the Steamship Meteor for the purpose of being transported to Washington, the plaintiffs, Mrs. Weade and Mrs. Stinemeyer, became and throughout the voyage continued to be what are known as passengers."

The jury was further instructed that Dichmann (as a common carrier) owed to Mrs. Weade and Mrs. Stinemeyer (as passengers) the duty to "use the utmost or highest degree of practicable care and diligence under the circumstances existing."

Dichmann is liable to the plaintiffs here if, *but only if*, we can read "the contract so as to find the agents to be owners *pro hac vice* in possession and control of the vessel." Mr. Justice Frankfurter, in *Caldarola v. Eckert*, 332 U. S. 155, 159.

In a letter to counsel, dated June 3, 1947, the District Judge stated:

"Upon consideration of the above cases I am of the opinion that the verdicts of the jury should not be set aside.

While the case of *Hust v. Moore-McCormack Lines, Incorporated*, 328 U. S. 707, is not precisely in point, it is my view that it is controlling so far as the liability of the defendant is concerned."

In a subsequent letter, dated July 28, 1947, the District Judge wrote:

[fol. 242] "I have also examined the opinion in the *Caldarola* case.

It is my conclusion that the questions involved in the cases under consideration are not governed by the decision in the *Caldarola* case."

We think that the *Caldarola* case is decisive here and requires us to reverse the judgments of the District Court.

In the majority opinion of Mr. Justice Frankfurter in the *Caldarola* case, 332 U. S. at page 159, we find:

"Petitioner insists, in order to enable him to sue in the courts of New York, that the Agents are to be

deemed, as a matter of federal law, owners of the vessel *pro hac vice* and, therefore, as a matter of State law, subject to the duties of such ownership under New York law toward business invitees. We reject this construction.

Our previous decisions do not require it. *Hust v. Moore-McCormack Lines*, *supra*, arose under the Jones Act. (Act of March 4, 1915, 38 Stat. 1185, as amended, June 5, 1920, 41 Stat. 1007). We there held that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer.' The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States."

True it is that in the *Caldarola* case, four justices dissented and Mr. Justice Douglas in his dissent (Mr. Justice [fol. 243] Black and Mr. Justice Murphy concurring) wrote:

"For the reasons stated in my separate opinion in *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 734, I think that respondents were owners *pro hac vice* of the vessel, since the business of managing and operating it was their business. They were, therefore, principals and liable to petitioner, a longshoreman who was injured while working on the deck of the vessel by reason of the breaking of a cargo boom, part of the ship's gear."

But we are not at liberty to decide what merit therein lies. The Supreme Court, in the majority opinion, has spoken and we must follow. See, also, *McCowan v. J. H. Winchester & Co.*, decided January 9, 1948, U. S. District Court, Southern District of New York.

The agency contracts in the *Hust* and *Caldarola* cases were substantially similar to the contract in the instant case. We find no reason for differentiating the instant case from the *Caldarola* case on the grounds advanced by plaintiff.

that here the United States did not exercise powers of supervision and control as fully as were warranted by the contract and that in actual practice Dichmann assumed functions of management which were broader than the terms of the contract might specify.

In the *Caldarola* case, *Caldarola* was an employee of a stevedoring concern engaged in unloading ships under a contract with the United States. The Supreme Court characterized him as a business invitee. Justice Frankfurter's opinion (382 U. S. at page 159) mentioned "duties of care to third persons, more particularly to a stevedore." We see no reason for not following the *Caldarola* doctrine [fols. 244-245] merely because Mrs. Weade and Mrs. Stine-meyer were passengers and not invitees, particularly as an even higher duty is owed to a passenger than to an invitee.

Since the defendant in the instant case moved for judgment notwithstanding the verdict, we are not limited to the granting of a new trial and defendant is entitled to have judgment entered in its behalf: *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212.

Our decision indicated above makes it unnecessary for us to consider or decide other questions raised in this case. We, of course, express no opinion as to the rights of the plaintiffs in this case to proceed against the United States.

The judgment appealed from will be reversed with direction that judgments be entered exonerating the defendant Dichmann of liability.

Reversed.

[fol. 246] JUDGMENT—Filed and Entered May 13, 1948

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5696

DICHMANN, WRIGHT & RUGH, Incorporated, a Delaware Corporation, Appellant,

VS.

LILLIAN A. WEADE, FREDERICK M. WEADE, AND ROBERT L. STINEMEYER, Appellees

Appeal from the District Court of the United States for the Eastern District of Virginia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Norfolk, for further proceedings in accordance with the opinion [fol. 247] of the Court filed herein.

John J. Parker, Senior Circuit Judge. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

June 8, 1948, petition of appellees for a stay of mandate is filed.

ORDER STAYING MANDATE—Filed June 10, 1948

(Style of Court and Title Omitted)

Upon the application of Appellees, Lillian A. Weade, Frederick M. Weade, and Robert L. Stinemeyer, by their counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Appellees in the Supreme Court of the United States for a writ of certiorari to this Court,

unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within 30 days from this date.

Morris A. Soper, United States Circuit Judge.

June 9, 1948.

[fol. 248]

STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1948

No. —

LILLIAN A. WEADE, FREDERICK M. WEADE, AND ROBERTA L.
STINEMEYER, Petitioners,

VS.

DICHMANN, WRIGHT & PUGH, Incorporated, a Delaware Cor-
poration, Respondent

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. Appendix to brief of appellant in the United States Circuit Court of Appeals for the Fourth Circuit.
2. Appendix to reply brief of appellant in the United States Circuit Court of Appeals for the Fourth Circuit.
3. Appendix to brief of appellees in the United States Circuit Court of Appeals for the Fourth Circuit.
4. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioners will [fol. 249] cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on appeal in the Circuit Court of Appeals for the Fourth Circuit; and that, in the event that the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcript of record on appeal in that court as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

Michael F. Keogh, Edw. L. Breeden, Jr., Walter E. Hoffman, Counsel for Petitioners. Leon T. Seawell, Counsel for Respondent.

June 17th, 1948.

[fol. 250]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief of appellant, the appendix to reply brief of appellant, the appendix to brief of appellees, and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on application for writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 19th day of June, A. D., 1948.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

[fol. 242] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed December 3, 1948

It is hereby stipulated by and between counsel for petitioners and counsel for respondents that the following portions only of the Transcript of Record now on file in the Supreme Court shall be reprinted:

1. Print pages 1 to 24 inclusive.
2. Print pages 27 to 33 inclusive, omitting the statement at the bottom of page 33 that Dr. G. Colbert Tyler was called as a witness, etc.
3. Print page 38.
4. Print pages 46 to 100 inclusive.
5. Print page 102 beginning with the words "GAA 4-4-42 contract WSA 4098, to page 122 inclusive.
6. Print pages 133 beginning with the word "interrogatories" to page 137 inclusive.
7. Print page 149 beginning with the words "Dr. Charles H. Peterson" to page 156, with the exception of the sentence at the end of page 156 beginning "Dr. G. Colbert Tyler."
8. Print page 179 beginning with the words "George C. Hudgins" and ending with the words "a man by the name of Bell."

[fol. 243] 9. Print pages 212 to 242 inclusive.

Michael F. Keogh, Richard H. Love, Woodward Building, Washington, D. C., Counsel for Petitioners. Philip B. Perlman, the Solicitor General, Counsel for Respondents.

William E. Leahy, William J. Hughes, Jr., Bowen Building, Washington, D. C., of Counsel.

December 2d, 1948.

[fol. 243a] [File endorsement omitted.]

[fol. 244] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9901)

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SUPREME COURT, U.S.
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 179

179

LILLIAN A. WEADE, FREDERICK M. WEADE AND
ROBERTA L. STINEMEYER,

Petitioners,

vs.

DICHMANN, WRIGHT & PUGH, INCORPORATED,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

MICHAEL F. KEOGH,
J. ROBERT CAREY,
RICHARD H. LOVE,
Counsel for Petitioners.

EDWARD L. BREEDEN, JR.,
WALTER E. HOFFMAN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 179

LILLIAN A. WEADE, FREDERICK M. WEADE AND
ROBERTA L. STINEMEYER,

Petitioners,

vs.

DICHMANN, WRIGHT & PUGH, INCORPORATED,

Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petitioners, Lillian A. Weade, Frederick M. Weade
and Roberta L. Stinemeyer, respectfully petition this
Honorable Court for a writ of certiorari to the United
States Circuit Court of Appeals for the Fourth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the
Fourth Circuit (R. 234) is reported at 167 Fed. 2d. —

Basis for Jurisdiction

The judgment of the Circuit Court of Appeals was entered May 13, 1948 (R. 239). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A. 240(a)), as amended by the Act of February 13, 1925; under Revised Rules of the Supreme Court of the United States, Rule 38, paragraph 5, sub (b), in that "A Circuit Court of Appeals . . . has decided an important question of federal law which has not been, but should be, settled by this court or has decided a federal question in a way probably in conflict with applicable decisions of this court," and further, because of the great importance of the question involved.

Questions Presented

1. Is it necessary to find the general agent owner *pro hac vice* in possession and control of the vessel owned by the United States to hold it liable to passengers of the vessel injured by the negligence of said general agent?

2. Did the Suits in Admiralty Act and the general agency agreement between the general agent and the United States give the respondent (general agent), immunity from suits brought by passengers for injuries caused by the negligence of the general agent?

3. Does the failure of the general agent in the management and conduct of the business of a United States vessel to provide adequately for the protection of passengers and to use due care in the procurement of crew members resulting in injury to passengers of said vessel, give rise to a common law action by the passengers against the general agent, or is the exclusive remedy of the passenger a suit against the United States under the Suits in Admiralty Act?

Statement of the Matter Involved

These cases involve actions by Lillian A. Weade and Frederick M. Weade, her husband, and Roberta L. Stinemeyer for personal injuries suffered by Mrs. Weade and Mrs. Stinemeyer while passengers aboard the S. S. Meteor, a ship owned by the United States, against Diekmann, Wright & Pugh, Inc., a shipping company, operating the vessel under a standard general agency agreement between the United States acting by and through the War Shipping Administration and the respondent, Diekmann, Wright & Pugh, Inc. The actions are based upon the negligence of the respondent, Diekmann, Wright & Pugh, Inc., in the management and conduct of the business of the said vessel and in its failing to perform duties owed by it to the petitioners as passengers (R. 1, 7).

In 1943 the War Shipping Administration entered into a contract with the respondent, commonly known as a general agency agreement (R. 102 *et seq.*). The respondent operated approximately 20 cargo vessels (R. 73) but did not enter upon passenger service under this agreement until June 1945, when Part II of the Service Agreement was executed by the parties and the respondent undertook the operation and management of two passenger vessels, the S. S. Meteor and the S. S. District of Columbia (R. 73, 120-122). On this operation the respondent took over the staff of the previous operator and owner of the S. S. District of Columbia, the Norfolk & Washington Steamboat Company, with the exception of its three top executive officers, and proceeded to operate both vessels in the Norfolk and Washington passenger service and "ran that line and directed its operation both in a general way and responsible for the details" (R. 212).

The general agent selected and appointed a master for the Meteor from among ship captains known to them, and

procured and selected a crew to operate the vessel in the usual manner customary for the manning of such vessels (R. 73-4, 76). It made no investigation of persons selected for the crew (R. 75, 77-78, 213-214). Its manner of selection of the crew members for this passenger vessel was the same as the method used for any other vessel operated by it in the cargo trade (R. 213-214). The record shows that as to the cook, Barnes, the respondent did not merely procure the man to be hired by the master but had actually employed him (R. 133, 136 (Int. 2); 179; 91-2). Further, the respondent deemed itself authorized not only to hire but to discharge employees aboard the vessel (R. 213, 214). The record discloses no rules, regulations or directions received by the general agent from the War Shipping Administration relative to the operation of this vessel in the passenger trade. Testimony does show that the captain and crew looked to the respondent for orders and instructions (R. 48, 54, 59, 62, 222).

The general agent handled all matters relating to the booking of passengers and the assignment of staterooms and offered to the public passage for hire between Norfolk and Washington on the S. S. Meteor (R. 121, 134, 136).

On the night of August 3, 1945, Mrs. Weade and Mrs. Stinemeyer boarded the Meteor at Old Point Comfort, Virginia and they thereupon became fare paying passengers and were assigned a stateroom (R. 174). They retired at approximately 11:00 p. m., Mrs. Weade taking the lower berth and Mrs. Stinemeyer, the upper (R. 181, 202). Between 3:00 a. m. and 3:30 a. m. Barnes, employed in the steward's department, entered the stateroom, assaulted and raped Mrs. Weade, and caused fright and shock to Mrs. Stinemeyer, who by fear and compulsion was forced to remain in the stateroom and witness the violation of Mrs. Weade (R. 203-5, 185-190).

Although the Coast Guard regulations required a suitable number of watchmen on *each* deck (R. 56, 217-18) and although the vessel in question had *three* decks (R. 228), at the time the events were occurring there was only *one* watchman on duty, one Charles Adkins, and he was resting on a lounge in the interior of the vessel (R. 24, 25, 26).

Upon trial before a jury the evidence showed among other things that:

1. Jack Lester Barnes, a cook aboard the S. S. Meteor, had a criminal record (R. 168-171).

2. The respondent in procuring Barnes as a member of the crew of the S. S. Meteor made no investigation into his past criminal record or his habits and traits of character (R. 77-78).

3. That the respondent procured and retained in service an inexperienced, incapable watchman who performed the duties of "fixer" of all slot machines on board and performed his duties as watchman by hourly tours and interim rest on the studio couch (R. 217, 221, 224-26).

4. The general agent procured and retained in service the watchman Adkins knowing he held two positions on board and drew compensation from an outside source, as well as from the respondent, in violation of Coast Guard rules and regulations (R. 217, 218, 220-21).

5. The general agent failed to procure and make available to the master for engagement by him the number of watchmen required by the Coast Guard rules and regulations for a vessel of the type of the S. S. Meteor (R. 218, 54-57, 225.)

6. The general agent failed in its duty to see that its "company rules" with regard to drinking by crew members aboard the vessel was enforced (R. 58-59).

The jury returned verdicts for Mrs. Weade in the sum of \$50,000; Mr. Veade, \$1,000, and Mrs. Stinemeyer, \$5,000 and judgments were entered upon the verdicts (R. 32). On May 13, 1948, upon the respondent's appeal, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the lower court, directing judgment for the respondent herein (R. 239), having found that the respondent herein as general agent was not owner of the vessel *pro hac vice* in custody and control of the vessel, and, therefore, for that reason not liable to the plaintiffs for any negligence resulting in their injuries (R. 234).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court and directing that judgments be entered exonerating the respondent Dichmann, Wright & Pugh, Inc. of liability.
2. In governing its decision by application of the decision of this Court in *Caldorola v. Eckert, et al.*, 332 U. S. 155, and in failing to consider and apply the doctrine laid down by this Court in the decision of *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575.

Reasons for Granting the Writ

This case presents for the first time in this Court the question of the liability of a general agent managing and conducting the business of a United States owned vessel under a general agency agreement to paid passengers of such a vessel for injuries suffered by reason of the negligence of the general agent. This Court has already considered under particular factual situations the liability of general agents operating United States vessels under general agency agreements to a visitor aboard the vessel in

Brady v. Roosevelt S. S. Co., 317 U. S. 575; to a seaman, in *Hust v. Moore-McCormick Lines, Inc.*, 328 U. S. 707; and, to a longshoreman, in *Caldorola v. Eckert, et al.*, 332 U. S. 155.

In the *Brady* and *Caldorola* cases injuries were caused by defective and dangerous conditions existing aboard the vessel, whereas in the *Hust* case the injuries were caused by negligence of a fellow servant: This provides a further and patent distinction between the cases heretofore decided and the instant case in that here a passenger is injured by the negligence of a general agent itself in failing to provide proper safeguards for the protection of passengers and its failure to use due care in the selection of members of the crew. Thus, here no questions of the application of the doctrine of *respondeat superior*, as in the *Hust* case, or any question of possession and control of premises imposing liability for their dangerous condition, as in the *Caldorola* case, are involved. Accordingly, the Circuit Court of Appeals for the Fourth Circuit has in this case decided an important question of federal law which has not been, but should be, settled by this Court.

The question of tort liability of the general agent to the passengers aboard a United States vessel arising out of the failure of the general agent to perform its duties so as to adequately protect passengers and to use the care prerequisite for the security and safety of passengers in their selection of employees, insofar as it is entangled with the construction of the general agency contract is a matter of federal concern; *Caldorola v. Eckert, et al., supra*. In addition, since the injury occurred to the petitioners on the maritime waters of the United States on a vessel owned by the United States, it might be characterized as a maritime tort and as such founded upon federal law. True, Section 9 of the Judiciary Act of 1789 saved "to suitors in all cases

the right of a common law remedy", nevertheless, the substantive right itself is a matter of federal law. *Waring v. Clarke*, 5 How, 441, 460-61; *The Moses Taylor*, 4 Wall. 411, 431; *Chelentis v. Luckenback S. S. Co.*, 247 U. S. 372, 384; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259.

The question presented is an important one. In view of our current and past history there have been many times of emergency, war, industrial dislocation and labor disputes which have made it necessary that the government take over and operate the shipping industry. The government has found it necessary on several occasions to take over the operations of shipping lines, using the equipment of private companies, as well as their managerial staffs and complete personnel. In view of this history and many legislative enactments of Congress authorizing and directing government control and operation of shipping, it becomes almost a certainty, that in some way or other, in our nation's future, parts or all of our shipping industry may pass from time to time to government control. Upon the various occasions in the past when emergency conditions necessitated public control of shipping, the methods used to accomplish that end have not been greatly dissimilar one from the other; and, the future will see the United States operating its own vessels and the vessels of private owners in the public interest in the same manner as the S. S. Meteor was operated by the United States through the War Shipping Administration as in this case, with the aid of private shipping companies such as the respondent acting as general agents. Therefore, the responsibility of such private shipping companies operating United States vessels under general agency agreements, to passengers carried on those vessels for injuries, should be determined and settled by the decision of this Court since it is a question of great public importance.

It is not necessary to find the general agent owner pro hac vice in possession and control of the vessel owned by the United States to hold it liable to passengers injured by the negligence of the general agent.

The Circuit Court of Appeals for the Fourth Circuit has decided this case in conflict with the applicable decisions of this Court. It has applied the rule of the *Caldorola* case to the questions raised here. The precise question there involved was whether the general agency contract created a relationship between the shipping company and business invitees aboard the vessel, which under New York law would impose liability for injury caused by dangerous conditions on board. The court found that there was not that possession and control of the vessel in the shipping company such as would under New York law make the shipping company liable to a longshoreman for injury caused by a defective boom. The instant case raises the question of liability of the general agent to passengers for injuries suffered by them caused by the negligence of the general agent itself. Despite that very clear distinction between the *Caldorola* case and this case, the Circuit Court of Appeals said: "We think that the *Caldorola* case is decisive here." The decision of this Court in the *Brady* case, which should be controlling since it decided the precise and single point that the general agent may be liable for its own torts, was completely ignored and not applied by the Circuit Court of Appeals. That the Circuit Court of Appeals was confused as to the issues and the applicability of the *Caldorola* decision appears from the fact that the Court quotes from Mr. Justice Douglas' dissent in the *Caldorola* case and goes on to state: "but we are not at liberty to decide what merit therein lies. The Supreme Court in the majority opinion

has spoken and we must follow." Nowhere in the opinion of the Circuit Court of Appeals is the *Brady* case cited or referred to and we must conclude that the court ignored the applicability of that decision to the issues raised here despite the fact that the *Brady* case decides the very point on which the theory of the petitioners' case has been based.

The neglect with which the general agent is charged is not such as would require as a prerequisite to liability that the general agent be found owner *pro hac vice* in possession and control of the vessel. The neglect charged and proven at the trial occurred and is quite independent of any control or possession by the agent while the vessel was en voyage. The general agent was engaged by the United States to manage and conduct the business of the vessels assigned to it because it was an experienced shipping company fully cognizant of all business and operational functions of the shipping business and experienced in the matters relating to the operation of cargo and passenger lines. The government in its widespread and diverse wartime activities, as a part of which it operated and controlled almost the entire merchant marine of the United States which itself was the largest in the history of the world, could not in a general way much less as to details control and manage individual lines, secure masters and crews for single vessels, arrange for passenger travel, and do all things required for the accommodation, security and protection of passengers. That is the very reason it secured and contracted with private shipping companies to act as general agent. As a practical matter the general agent did, under the General Agency Agreement, procure a master and the crew, equipped and supplied the vessel and arranged for the transportation of passengers; and, further, in actual practice it alone inquired, to the extent that any inquiry was made, into the qualifications of crew members, it alone discharged crewmen, issued orders and directives for disciplining the crew and the

master served the general agent and looked to the company for directions. The respondent here, an experienced shipping company, knew the duties and obligations owed by a carrier to its passengers and was fully aware that its experience and knowledge was the reason it was called upon to act as the government's general agent. With knowledge of all that was required of carriers with regard to their duties to passengers, this general agent, charged with the management and conduct of the business of the vessel and with arrangements for the transportation of passengers, with the duty to equip and supply the vessel, and with the duty to procure master and crew needed to fill the complement of the vessel, miserably failed to meet its responsibilities. It is respectfully submitted that its negligence in this regard, irrespective of its position of owner *pro hac vice* in possession and control of the vessel, imposed upon it liability to passengers.

IA

In any event, the record in the instant case shows such possession and control of the vessel in the general agent upon which liability to these petitioners may be founded.

It has been contended that the general agency agreement in the instant case was intended to and did make certain that the operation of vessels under it was the operation of the United States and not the general agent, that the master as agent of the United States, owner of the vessel, was in complete possession and control and that the crewmen were the employees of the United States hired by the master. The court below, accepting this interpretation of the language of the general agency agreement and the announced intention of the parties to it, particularly as expressed by counsel in briefs and arguments, together with confusion injected into the case by counsel for the United States as *amicus curiae* in its discussion of berth agency agree-

ments which are in no wise involved in this matter, held that "Dichmann is liable to the plaintiffs here if, but only if, we can read the contract so as to find the agents to be owners *pro hac vice* in possession and control of the vessel", and then proceeded to conclude a want of that prerequisite to absolve the respondent from any obligation to the passengers injured aboard the vessel. So that by virtue of the contract between the principal and agent the rights of these petitioners are denied.

In *Hust v. Moore-McCormick Lines, Inc.*, *supra*, Mr. Justice Douglas in his concurring opinion at page 736, said:

"If the parties to a contract could by the choice of a label determine these questions of responsibility to third persons the problem would be simple. But the conventions of the parties do not determine in the eyes of the law the rights of third persons. *Brady v. Roosevelt S. S. Co.* 317 U. S. 575, 583. . . ."

It becomes pertinent then to inquire into what the parties did under the contract. If there is substantial control in connection with the management or operation of a vessel or its business, the agent as "operator" must be deemed owner *pro hac vice*. In *Quinn v. Southgate Nelson Corp.*, 121 Fed. 2d, 190, it was held necessary to show only partial control by the agent to develop that the agent was actually "operating" the line.

In the instant case the respondent's president testified that they "ran the line and directed its operation, both in a general way and responsible for the details" (R. 212). The president stated that the respondent was "general steamship agents, operators" (R. 72); that they "operated under Coast Guard regulations" (R. 217) "and they were paid for operating the line" (R. 84). As far as Barnes was concerned he was employed by Mills E. Bell, an employee of the

respondent, not the United States (R. 133, 136 (Int. 2) 179, 91-92); that the respondent and its officers believed themselves authorized to discharge employees of the vessel (R. 213-14). The respondent's president stated: "We appointed Captain Hudgins, whom we knew"; (R. 73-74) and the master of the ship looked to the company for rules and regulations and was subservient to the company (R. 48, 54, 59, 62) and Adkins, a member of the crew, looked to the respondent for instructions (R. 222). Although the general agency agreement provided that the general agent "manage and conduct the business for the United States in accordance with such directions, orders or regulations as the latter has prescribed or from time to time may prescribe", the record discloses no directions, orders or regulations given by the United States to the respondent, except some direction with regard to the handling of money and accounts. This condition is very unlike that found in the *Caldorola* case, where the record contained voluminous orders, directions and regulations which did minimize the control exercised by the general agent.

The fact that the general agency agreement provided that the master should have full control over the vessel and its crew added nothing to his responsibilities imposed by law; *The Oregon*, 158 U. S. 186. Therefore, the contention that the master had full authority and control over the vessel and its crew does not justify the conclusion that the general agent, that actually operated the vessel and exercised so much control, was not in the position of owner *pro hac vice* in possession and control of the vessel.

That the general agent under the general agency agreement might be subject to liabilities and claims growing out of whatever degree of custody and control and possession of the vessel it had and its manner of performance of its agreements insofar as they affected third persons, was con-

sidered by the parties to the general agency agreement, is demonstrative in those sections of the agreement dealing with indemnity and insurance (R. 110, 115).

It is, accordingly, submitted that the record clearly discloses sufficient bases for holding the general agent owner *pro hac vice* in possession and control of the vessel insofar as passengers are concerned.

II

The general agent does not have immunity from suits by passengers for injuries caused by its own negligence.

The ruling of this Court in the case of *Brady v. Roosevelt S. S. Co.*, *supra*, was to the effect that the Suits in Admiralty Act did not make private operators, such as the general agent therein, non-sueable for their torts. This ruling, however, would be clearly decisive of the question presented in the present case were it not for the fact that the general agency contract in the *Brady* case is slightly different than the general agency contract involved in the present case. The essential differences are that in the latter contract an attempt was made by a change in the wording of Article I and Article III(a) to make certain that the operation of the ship appears to be government operation, and the master and crew appear to be the agents and employees of the United States Government. While the general agency contract in the *Hust* case was somewhat similar to the contract in the present case, the *Hust* case determined the rights of a seaman against the general agent under the Jones Act. It is significant to point out, however, that in none of the cases heretofore reviewed by the Supreme Court has the question arisen as to the interpretation of a general agency contract under which the general agent has been engaged in the business of operating passenger vessels.

If the interpretation placed upon the *Caldorola* case by the Fourth Circuit Court of Appeals is determinative of the rights of passengers, all claims of passengers against general agents will be barred. By the strict application of the possession and control doctrine the general agent is given complete and absolute immunity from all claims arising from injuries to passengers. It is submitted that the decisions of this Court do not give such an immunity. In fact, the *Brady* case specifically stated that the suits in Admiralty Act did not free the agent from liability for his own torts. The *Caldorola* case was determined on the narrow issue as to whether under the stated facts *Caldorola* was entitled to recover against the general agent. This Court has stated in the *Brady* case: "moreover, if petitioner had a cause of action against the respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained"; citing *Guaranty Trust Co. & S. D. Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137. The rights of principals and agent *inter se* are not the measure of the rights of third persons against either of them for their torts. Regardless of the merit of the statement of Mr. Justice Douglas as applied to the *Caldorola* case, "whatever the consequence is in other situations, it is shocking to find private operators getting immunity in this manner from their traditional liability for tort claims," that statement is most pertinent here. This court has not yet held that general agents are entitled to the broad immunity given to them by the decision of the Fourth Circuit Court of Appeals. The agent was negligent, its negligence was conclusively established; it is not exonerated by statute, and, therefore, it should not be granted immunity by judicial decree.

III

The Suits in Admiralty Act does not provide the exclusive remedy for passengers aboard United States vessels injured through the negligence of a general agent.

The error of the Circuit Court of Appeals in unequivocally applying the doctrine of the *Caldorola* case indicates a confusion of just what negligence is charged against the respondent. There is no attempt here to charge the respondent with the negligence of a crew member under the doctrine of *respondeat superior* as in the *Hust* case. There is no attempt here to impose liability upon the general agent upon any theory of defective or dangerous conditions in the physical premises of the vessel such as would impose liability upon one in the position of owner or one in immediate possession and control of the premises. The simple issue involved in the case was whether the general agent owed a duty to passengers and whether it was negligent in the fulfillment of that duty, which neglect proximately caused the injury to the petitioners.

If the general agent bound itself by contract exclusively to manage and conduct the business of the vessel, arranged for the transportation of passengers, equip; victual, supply and maintain the vessel, it created the risk that its failure to perform its obligation might cause injury to innocent third parties, particularly passengers. Consequently, the general agent is under the duty to such parties to save them harmless from that risk. For the negligent breach of that duty the law imposes liability on the agent. *Dahms v. General Elevator Co.*, 214 Cal. 733; *Van Winkle v. American Steam Boiler Ins. Co.*, 52 N. J. L. 240; *Hudson v. Moonier*, 102 Fed. (2d) 96, 99, C. C. A. 8; *Murray v. Cowherd*, 148 Ky. 591; Restatement of Torts, Sections 404 and 395. See

also *Osborne v. Morgan*, 130 Mass. 102, 2 Am. Jur., Agency, Section 333, p. 262.

It has been long established that the right of a ship owner to limit its liability is dependent upon his want of complicity in the acts causing the disaster and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service. *McGill v. Michigan S. S. Co.*, (C. C. A. 9, 1906) 144 Fed. 788; *The Elton* (C. C. A. 3, 1906) 131 Fed. 562, 142 Fed. 367; *The Cygnet* (C. C. A. 1, 1903) 126 Fed. 742.

Where competent, careful and safe employees are required to accomplish an undertaking it is negligence on the part of the person procuring and selecting them not to procure and select such persons having such qualifications, which negligence renders them liable to persons for injuries occasioned thereby. *Shoemaker v. Kingsbury*, 79 U. S. 369; *Holladay v. Kennard*, 79 U. S. 254; *Nieto v. Clark*, Fed. Case #10262 (C. C. Mass.); *Gallena v. Hot Springs R. Co.*, 13 Fed. 116.

In the *Brady* case the court stated that the sole question involved was whether the Suits in Admiralty Act made private operators, such as the respondent, non-sueable for their torts. The court held that the rule handed down in the *United States Shipping-Board Emergency Fleet Corp. v. Lustgarten*, 280 U. S. 320, was untenable so far as it would prevent a private operator from being sued for his torts. As the *Brady* case has not been overruled by this court, its holding that the remedy of an injured third person aboard a United States vessel is not confined to the Suits in Admiralty Act is controlling.

Conclusion

The question presented is one of grave importance to the public generally; the decision below in conflict with decisions of this Court adopts a rule which deprives passengers aboard United States vessels of common law rights, and gives immunity to private operators, which immunity is neither sanctioned by statute nor decisions of this Court. Only this Court can finally resolve the confusion attending the question. We therefore respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted;

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(7614)

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 179.

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ROBERTA L. STINEMEYER,

Petitioners,

vs.

DICHMANN, WRIGHT & PUGH, INCORPORATED,
Respondent.

BRIEF OF PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Opinions Below.

The opinion of the court below is reported in 168 Fed. (2d) 914; it is found in the record at R. 123.

Jurisdiction.

The jurisdiction of this court is invoked under 28 U. S. C. A. Section 1254 (1).

Questions Presented.

1. Where a suit is based on the negligence of the agent (Respondent) in failing to use due care in the selection of reliable employees on board ship, and in failing to arrange to protect passengers on the voyage, is it necessary to find

the general-agent owner *pro hac vice* in control of the vessel in order to hold the agent liable for such negligence? Does the General Agency Agreement (R. 81) with the United States confer immunity on the general agent for such a tort?

2. Does the General Agency Agreement between Respondent and the United States give Respondent (general agent) immunity from suits brought by passengers for injuries caused by negligence of the general agent?

Statement.

The court below reversed judgments of \$50,000 in favor of Mrs. Weade; \$1,000 in favor of her husband; and \$5,000 in favor of her companion, Mrs. Stinemeyer, growing out of the rape of Mrs. Weade, while a passenger on board the U. S. S. METEOR, by a member of the crew. The court below ordered judgment entered exonerating Respondent of liability. The basis of the court's opinion was its belief that this case was controlled by *Caldarola v. Eckert*, 332 U. S. 155 (R. 123-127).

Allegations of the Complaints:

In one complaint Lillian A. Weade and Frederick M. Weade, her husband, alleged that Mrs. Weade was a paid passenger on the S. S. METEOR, operated as a common carrier by Respondent from Old Point Comfort, Virginia, to Washington, D. C. The complaint alleges:

"While sleeping aboard said vessel in said stateroom during the course of her passage from said Old Point Comfort, Virginia, to Washington, D. C., and as the result of the failure of the defendants to provide protection for sleeping passengers from the personal misconduct of its employees, and/or as a result of the failure of the defendants to use due care in the selection of reliable, competent and careful employees, and/or as a result of the failure of the defendants to

provide reasonable safeguards for the protection of passengers on said vessel, and/or as a result of the failure of the defendants to comply with applicable law under the circumstances then existing, the plaintiff, Lillian A. Weade, was assaulted, raped and injured by a negro employee of said defendants. As a result thereof plaintiff sustained serious permanent injuries" (R. 1).

In the same complaint the husband sued for the loss of services and society of his wife (R. 3).

The complaint of Mrs. Roberta L. Stinemeyer, who occupied the same stateroom with Mrs. Weade, is substantially similar (R. 6-8).

Respondent's Answer:

As to the Weade complaint, Respondent denied that it was a common carrier and set up the defense of the Agreement it had with the War Shipping Administration (R. 4). It admitted that under this agreement Respondent was to "procure and make available to the master for engagement by him the officers and men required by him to fill the complement of the vessel" (R. 5).

Respondent's answer to the Stinemeyer complaint set up substantially the same defenses (R. 8-10).

The Evidence.

As to the Rape and Conditions Aboard Ship:

So far as here pertinent the evidence shows that on the night of August 3, 1945, after purchasing tickets from Respondent (R. 22, 68), Mrs. Weade and Mrs. Stinemeyer boarded the METEOR at Old Point Comfort, Virginia and they thereupon became fare paying passengers and were assigned a stateroom (R. 23, 68). They retired at approximately 11:00 p. m., Mrs. Weade taking the lower berth and Mrs. Stinemeyer, the upper (R. 48, 52, 72). Between 3:00 a. m. and 3:30 a. m. Barnes, a negro, employed in the stew-

ard's department on board ship, entered the stateroom, assaulted and raped Mrs. Weade, and caused fright and shock to Mrs. Stine Meyer, who by fear and compulsion was forced to remain in the stateroom and witness the violation of Mrs. Weade (R. 123). The rape was an atrocious one, for which Barnes was later tried and executed (*Barnes v. State*, (Md.) 47 Atl. (2d) 50). Mrs. Weade was strangled to the point where blood was forced out of her eye-balls (R. 49, 51, 102-105; 124).

Although the Coast Guard regulations (R. 39, 109-110) required a suitable number of watchmen on *each* deck and although the vessel in question had *three* decks (R. 31, 37, 39), at the time the events were occurring there was only *one* watchman on duty, one Charles Adkins, and he was resting on a lounge in the interior of the vessel (R. 37-39, 76-81, 111-117).

The evidence showed that Barnes, the rapist, had a criminal record when he was engaged as cook (R. 28-29, 74). No investigation was made into his past criminal record or his habits and traits of character before respondent hired him (R. 57-60, 75-76, 106-107). Respondent admitted it was authorized not only to hire but to discharge crew members (R. 107).

Respondent also procured and retained in service an inexperienced, incapable watchman (R. 109, 111-116) whose real duties consisted of fixing slot machines on board the ship (R. 111-112). He sandwiched-in his duties as watchman with his slot machine activities and made hourly tours with interim rests on the studio couch (R. 111-116). Respondent procured this watchman knowing he held two positions on board and drew compensation from an outside (slot machine) source (R. 111), as well as from Respondent (R. 112), in violation of Coast Guard regulations (R. 110). The evidence showed Respondent failed.

to procure and make available to the master for engagement by him the number of watchmen required by Coast Guard regulations for a vessel of the type of the S. S. METEOR (R. 38-40, 46, 110). Also Respondent failed in its duty to see to it that "company rules" with regard to drinking by crew members aboard ship were enforced (R. 41-42). Barnes, the rapist, had been drinking at the time of the rape (R. 41-42, 44, 72) and was roaming about the ship (R. 36, 41-42, 44, 70-72). Plaintiff's stateroom was on the galley, or boat deck (R. 32-33) where Barnes had no right to be (R. 30, 33, 36, 70-72). The evidence also showed Respondent put Petitioner in a stateroom on board that had no screen—apparently none of the staterooms had screens (R. 32, 36, 69-70, 78; Interrog. 14-16, 98, 100), (Stenog. Tr. pp. 55-56, 61) so that on a hot August night, with the temperature around 90° (R. 43, 123), the passengers were compelled to leave the stateroom door and the unscreened window open to let in air (R. 43, 47-48, 50-54, 123).

As to Respondent's Duty Under Its General Agency Agreement;

Under the General Agency Agreement (R. 81) the United States appointed Respondent its agent "to manage and conduct the business" of the vessel, which appointment Respondent accepted (Art. 1 & 2, R. 82). Under Article 3(a) it is the duty of the General Agent:

(a) To maintain the vessel in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, etc., "and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices."

(b) Collect all monies due the United States, etc.

(c) Equip, victual, supply and maintain the vessel subject to such directions, orders, etc. as the United States may give.

(d) Procure the master who, shall be an agent and employee of the United States and "shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel" (R. 82).

Article 3A(d) also provides that the "General Agent shall procure and make available to the master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent, through the usual channels and in accordance with the customary operations. * * * The officers and members of the crew shall be subject only to the orders of the master (R. 82-83).

Under Article 3(B) the General Agent agreed, subject to the provisions of Articles 8 and 16, to perform its duties in an efficient manner and "exercise due diligence to protect and safeguard the interest of the United States in all respects and to avoid loss and damage of every nature to the United States" (R. 84).

Article 8, just referred to, provides that the United States shall procure insurance against all insurable risks whatsoever, including damage to persons or property. Under this article it is the duty of the United States to safeguard the General Agent from any damage on account of such risks and liabilities to the extent not fully covered by insurance (R. 87-88).

Under Article 16, just referred to, the United States agrees to indemnify the General Agent against all claims, including attorney's fees "whether or not the claim or demand be found to be valid", of whatever kind or nature and by whomsoever asserted "for injury to persons or property arising out of, or in any way connected with the operation or use of such vessels or the performance of the General Agent of any of the obligations hereunder, includ-

ing but not limited to any and all claims and demands by passengers * * * for damage for personal injury" (R. 91-92).

Article 14 places the duty of maintenance and repair upon the General Agent (R. 91) and requires the General Agent to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessel" (R. 91).

Part II of the General Agency agreement provides for the use of the vessel in the passenger service. It amends Article 3(a) by adding sub-section (f) which provides that the General Agent "shall arrange for the transportation of passengers when so directed, and issue or cause to be issued to such passengers, customary passenger tickets" (R. 95-96).

As to Respondent's Defense that United States Alone was Liable:

Respondent submitted in evidence its General Agency Agreement with the War Shipping Administration of the GAA 4-442 type, which is found in the record in its entirety (R. 81-96). This agreement was entered into with Respondent on January 9, 1943. The Respondent operated approximately 20 cargo vessels (R. 55) but did not enter upon passenger service under this agreement until June, 1945, when Part II of the Service Agreement was executed by the parties and the Respondent undertook the operation and management of two passenger vessels, the S. S. METEOR and the S. S. DISTRICT OF COLUMBIA (R. 55, 95-96). On this operation the Respondent took over the staff of the previous operator and owner of the S. S. DISTRICT OF COLUMBIA, the Norfolk & Washington Steamboat Company, with the exception of its three top executive officers, and proceeded to operate both vessels in

the Norfolk and Washington passenger service and as the President stated, "ran that line and directed its operation both in a general way and responsible for the details" (R. 105-106).

The general agent selected and appointed a master for the METEOR from among ship captains known to them, and procured and selected a crew to operate the vessel in the usual manner customary for the manning of such vessels (R. 56-58). It made no investigation of persons selected for the crew (R. 56, 59-60, 105-106). Its manner of selection of the crew members for this passenger vessel was the same as the method used for any other vessel operated by it in the cargo trade (R. 105-107). The record shows that as to the cook, Barnes, the Respondent not only procured the man to be hired by the master, but actually employed him on board ship (R. 74, Interrog. 2, 97, 99, 105-106). Further, Mr. Allen Smith, President of Respondent company, testified the Respondent deemed itself authorized not only to hire but to discharge employees aboard the vessel (R. 105-106). The record disclosed no rules, regulations or directions received by the general agent from the War Shipping Administration relative to the operation of this vessel in the passenger trade. Testimony does show that the captain and crew looked to the Respondent for orders and instructions (R. 42, 55, 106, 109, 112). Moneys received from operations were deposited in a special account under the name of "Diehmann, Wright & Pugh" (R. 61).

The general agent handled all matters relating to the booking of passengers and the assignment of staterooms and offered to the public passage for hire between Norfolk and Washington on the S. S. METEOR (R. 96, Interrog. 9, 97, 99).

Respondent's Motion for Directed Verdict and the Court's Charge to the Jury:

At the close of the plaintiff's testimony, Respondent moved for a directed verdict on the basis of the contract with the War Shipping Administration (R. 11), which motion was renewed at the close of the entire case (R. 12). Upon overruling the motion the court instructed the jury, as a matter of law, that the contract did not prevent Respondent from being held responsible for any act of negligence on its part that the jury might find (R. 14). The court further instructed the jury that Respondent was a common carrier and that it was under the duty of exercising the highest degree of care (R. 17-18). The court said:

"This duty to exercise the highest degree of care extends to all acts of the carrier, the defendant in this case, in connection with transporting passengers and includes such provisions as are proper for providing safe accommodations, a suitable number of watchmen in all passenger quarters and on each deck, protection from danger or peril, *the selection of competent, careful and sober employees*, and all other details relating to the operation of a common carrier of passengers such as the one here involved" (R. 18; Italics ours).

Respondent's Exception to the Charge and Requests for Instructions:

Respondent excepted to the charge insofar as it failed to hold Respondent was exonerated by its contract with the Government, and also to the charge that Respondent was a common carrier (R. 19).

Respondent also requested an instruction that the S. S. METEOR was being operated by the United States under the contract, and that the United States was the employer of the man Barnes for whose acts it alone was responsible. These requested instructions were refused (R. 19-21).

Respondent's Motion to Set Aside Verdict and Enter Judgment for Respondent and the Court's Rule:

Respondent also moved to set aside the verdict and enter judgment for defendant (R. 21), which the court took under consideration and overruled (R. 24-26). In effect, the court held that *Caldarola v. Eckert*, 332 U. S. 155, was not controlling (R. 26). The court referred to *Hust v. Moore-McCormack Lines, Incorporated*, 328 U. S. 707 (R. 24), and held that "in the instant case the injuries were sustained as a result of negligence and misconduct on the part of those employed by the agent (R. 26).

Basis of the Decisions Below:

The Court of Appeals, without discussing any other questions, reversed solely on the basis of *Caldarola v. Eckert*, 332 U. S. 155, stating:

"Dichmann is liable to the plaintiffs here if, *but only if*, we can read 'the contract so as to find the agents to be owners *pro hac vice* in possession and control of the vessel.' Mr. Justice Frankfurter, in *Caldarola v. Eckert*, 332 U. S. 155, 159² (Op. R. 125).

The court below adverted to the dissent by four justices in the *Caldarola* case, but held that it was not at liberty to decide what merit lay therein. The court did not discuss petitioners' theory of the case based on the negligence of the general agent in *procuring the crew*, and in failing to establish proper safeguards for the carriage of passengers (R. 126-127).

Specification of Errors to Be Relied On.

The court below erred:

1. In reversing the judgment of the District Court and directing that judgments be entered exonerating the Respondent Dichmann, Wright & Pugh, Inc. of liability.

2. In governing its decision by application of the decision of this court in *Caldarola v. Eckert, et al.*, 332 U. S. 155.

3. In failing to recognize Petitioners' theory of the case based upon the negligence of the general agent in procuring the crew and in failing to afford proper safeguards for the carriage of passengers.

Outline of Argument.

No theory of ownership *pro hac vice* is necessary to hold the General Agent liable where the suit is based on the negligence of the General Agent in failing to select proper crew members and in other ways to afford proper safeguards for plaintiff's trip. Respondent was not a mere ticket-seller whose liability was limited to guaranteeing the genuineness of the paste-board. Plaintiff, when she purchased her ticket from Respondent was entitled to believe that Respondent as a common carrier would carry her safely to her destination. Respondent's failure to do so because of its selection of improper crew members and failure otherwise to establish proper safeguards for Respondent's passage, amounts to negligence for which it can be held liable. *Caldarola v. Eckert*, 332 U. S. 155 is, therefore, not in point. Respondent is liable both under general tort law and under the provisions of the General Agency Agreement, which contemplates that the general agent should be liable to the public for its own negligence. Under the General Agency Agreement, the duty of Respondent to maintain the vessel in the passenger trade required Respondent to select proper crew members and otherwise to arrange for a safe passage by affording proper watchmen for the maintenance of discipline aboard ship. Under a War Shipping directive, discipline aboard ship was a duty of the General Agent. The totality of Respond-

ent's duties and activities makes it liable and if anything in *Caldarola v. Eckert, supra*, can be construed to destroy Respondent's liability under the State law, the case should be distinguished or overruled.

POINT 1.

No Theory of Ownership Pro Hac Vice Is Required to Hold Respondent Liable for Its Own Negligence.

The question of the liability of Respondent, as distinguished from the War Shipping Administration, for negligence in the procurement of members of the crew, was squarely presented by the Petition for Writ of Certiorari herein. Question 3, page 2, of our Petition stated:

"Does the failure of the general agent * * * to use due care in the procurement of members of the crew, resulting in injury to passengers of said vessel, give rise to a common law action by the passengers against the general agent or is the exclusive remedy of the passenger a suit against the United States under the suits in Admiralty Act."

This was the theory of the suit. Paragraph 2 of the Complaint alleges:

"* * * as the result of the failure of the defendants to provide protection for sleeping passengers from the personal misconduct of its employees, and/or as a result of the failure of the defendants to use due care in the selection of reliable, competent and careful employees, and/or as a result of the failure of the defendants to provide reasonable safeguards for the protection of passengers on said vessel; and/or as a result of the failure of the defendants to comply with applicable law under the circumstances then existing, the plaintiff, Lillian A. Weade, was assaulted, raped and injured by a negro employee of said defendants" (R. 2).

Article 2 A (d) of the General Agency Agreement with the War Shipping Administration provides:

"The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel" (R.).

Upon trial before a jury the evidence showed among other things that:

1. Jack Lester Barnes, a cook aboard the S. S. METEOR, had a criminal record (R. 28-29, 74).

2. The Respondent, in procuring Barnes as a member of the crew of the S. S. METEOR, made no investigation into his past criminal record or his habits and traits of character (R. 57-60, 75-76, 106-107).

3. That the Respondent procured and retained in service an inexperienced, incapable watchman who performed the duties of "fixer" of all slot machines on board and performed his duties as watchman by hourly tours and interim rest on the studio couch (R. 109, 111-116).

4. The general agent procured and retained in service the watchman Adkins knowing he held two positions on board and drew compensation from an outside source (R. 111), as well as from the Respondent (R. 112), in violation of Coast Guard rules and regulations (R. 110).

5. The general agent failed to procure and make available to the master for engagement by him the number of watchmen required by the Coast Guard rules and regulations for a vessel of the type of the S. S. METEOR (R. 38-40, 46, 110).

6. The general agent failed in its duty to see that its "company rules" with regard to drinking by crew members aboard the vessel was enforced (R. 41-42).

The above questions of negligence were submitted to the jury by the Trial Court (R. 18). The Trial Court held,

after verdict, that "the injuries were sustained as a result of negligence and misconduct on the part of those employed by the agent" (R. 26).

It is obvious that Respondent's negligence in the selection of improper crew members antedated the voyage and would exist whether Respondent was the owner *pro hac vice* or not. It would be on a parity with furnishing spoiled food for the voyage or sending out an unseaworthy ship, for which, under Article 16 (a) of the Agency Agreement and the law of Virginia, the agent would be responsible.

It is elementary that an agent is responsible for his own torts. As said in *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, 580:

"The liability of an agent for his own negligence has long been imbedded in the law."

See also:

Sloan Shipyards v. U. S. Fleet Corp., 258 U. S. 549, 567, 568.

Quinn v. Southgate Nelson Co., 121 F. (2d) 190, 191.

Shipping Board v. Greenwald, 16 F. (2d) 948.

Blumenthal v. U. S., 30 F. (2d) 247, 248.

Chiarello Bros. Co. v. Pedersen, 242 F. 482, 484.

Pennell v. H. O. L. C., 21 F. Supp. 497.

In *Inland Waterways Corp. v. Hardee*, 100 F. (2d) 678, 685, a case wherein the United States was the principal, the court said:

"An agent is not excused from liability for his torts because he acted only as agent, whoever his principal may be."

POINT 2.

Caldarola v. Eckert Is Not in Point as to Negligence of the General Agent Unrelated to Control of the Vessel.

The court below based its decision squarely on the *Caldarola* case. It held that Respondent was liable:

"if, *but only if*, we can read 'the contract so as to find the agents to be owners *pro hac vice* in possession and control of the vessel.' Mr. Justice Frankfurter in *Caldarola v. Eckert*, 332 U. S. 155, 159." (R. 125)

It seems self-evident that as to the second ground of negligence alleged in the Complaint (R. 2), "the failure of the defendant to use due care in the selection of reliable, competent and careful employees" there is no necessity that Respondent should be the owner *pro hac vice* of the vessel. It is the negligence of the *agent* which is actionable; the agent's liability is separate from and independent of that of the operators of the vessel. The situation is quite different from that in the *Caldarola* case wherein the stevedore employed by the Agent was injured by a defective boom which the court held it was the duty of the principal to maintain in good working order (*Caldarola* Opinion p. 156-7). The *Caldarola* case simply held that New York law required, in these circumstances, "possession and control" *i.e.* ownership *pro hac vice*, before the Agent could be held liable (*Caldarola* Op. p. 158-9). The *Caldarola* case also holds that the Agency contract requires, to give the stevedore the right to recover, the same sort of control required by New York law. As the court held there was no such possession or control it held there could be no recovery either (a) under New York law or (b) on the basis of the Agency Agreement construed under Federal law (*Caldarola* Op. p. 158-9; See also *S. R. A. Inc. v. Minn.*, 327 U. S. 558, 564).

Further, the *Caldarola* case involved a maritime tort (*Caldarola* Op. p. 157), the nature of which was deter-

minable under Federal law (*Robins Dry Dock Co. v. Dahl*, 266 U. S. 449), the only question for the State court being whether the Agent, under State law, could be held (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Riley v. Aguilines*, 296 N. Y. 402, 406; *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383; *Caldarola v. Eckert*, 332 U. S. 155, 157-8). In the present case insofar as Petitioner's suit is based on the act of the Agent in furnishing unreliable and vicious crew members and inadequate protection to the passenger, the tort is not maritime but shore-side. Hence no control at all of the vessel, or ownership *pro hac vice*, during its voyage is required. As the present suit is based on diversity the simple question was presented below whether, under applicable State law, (*Erie R. Co. v. Tompkins*, 304 U. S. 64; *Hudson v. Moonier*, 304 U. S. 397) Petitioner was entitled to recover from the Agent for its negligence in furnishing a vicious crew member and retaining him as such when it admitted it was authorized to discharge him (R. 105-106) and for its other acts of negligence in picking the crew and failing to arrange to protect passengers on the voyage. The Trial Court held in the affirmative. The court below erroneously held, on the basis of the *Caldarola* case, that ownership *pro hac vice* was required to hold the Agent responsible for such a tort. It seems self-evident that the only question decided in the *Caldarola* case is irrelevant on this point. There is obviously no need for Petitioner to spell out ownership *pro hac vice* from the Agency contract if under general state tort law the agent is liable for its own negligence in procuring crew members and in failing to provide adequate protection.

POINT 3.

Though the Point May Not be Involved Here, the Agent Can Be Held For Negligence in Procuring Improper Crew Members.

Though, strictly speaking, we do not think the point is involved here, the decision below being based solely on the *Caldarola* case, there is ample authority for holding the Agent for negligence in procuring crew members. Respondent answered Interrogatory No. 9 as follows:

"Interrogatory 9:

"As agent for the War Shipping Administration, did you offer, to the public in general, passage from Norfolk to Washington on said METEOR on the night of August 3, 1945, subject to prepayment of established fares, provided said passenger was a law abiding citizen." (R. 97)

"Answer of Respondent:

"Yes, as Agents only." (R. 99)

The passenger ticket (R. 22) purchased by Petitioner and the Stateroom Card (R. 23) show that they were "Issued by Washington-Hampton Roads Line" and state on their face that Respondent was "Agent". The fact that they also state the Line was operated by the United States does not destroy the implied guaranty of the ticket seller.

Under these circumstances Respondent was a common carrier insofar as the public was concerned and required to exercise the highest degree of care in performing its duties. (58 C. J. p. 548 and cases cited). The Trial Court so instructed the jury (R. 16-17; 20-21). The fact that Respondent claimed, above, that it acted only as Agent is immaterial.

The respondent's answer to the question whether it offered plaintiff passage was:

"Yes, as agents only."

Admittedly, then, the general agent was engaged in the business of a common carrier as agent. The general law is that one who conducts the business of a common carrier is himself to be regarded as a carrier and subject to the duties and liabilities incident to such a business, *9 Am. Jur.* p. 447, Sec. 35, and because he performs his duties in connection with that business as agent for another is no reason why he is less a carrier, *Ibid.*, Sec. 36.

Under the Service Agreement there can be no doubt that the general agent undertook to manage and conduct the business of the vessel and to maintain the vessel in such trade as the United States might direct. Further, it bound itself to arrange for the transportation of passengers when so directed and to issue passenger tickets. Under these provisions of its Service Agreement, the general agent maintained terminals, operated ticket offices, arranged for the loading and unloading of passengers, collection of fares, advertising of service, fares and schedules, provisioned the ship, maintained it and procured its crew of officers and men. All of these things are directly incident to and part of a transportation service, and the general public applied, in ordinary course of securing transportation for hire, to the facilities of the general agent; and, the general agent recognized that it was performing the services as a common carrier, at least as agent.

The defense that the carrier renders its service under contract and as agent for another and is not therefore bound by the incidents, obligations, duties and liabilities of a common carrier has been raised in a number of cases. In *U. S. v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 39 S. Ct. 283, 63 L. Ed. 613, 16 A. L. R. 527 (1918), it was sought to hold the terminal company within the coverage of the Hours of Service Act. The terminal company defended on the ground that it was not a common carrier, that it

did not hold itself out as such, owned no cars for the transportation of freight but merely switching engines which it used to transport cars of others, that it filed no tariffs, had only 8 miles of track which served as connecting links with various rail and water carrier facilities, that it was *under contract and acted as agent* for 10 railroads and water carriers, and all monies received by it were accounted for to the contracting carriers. Mr. Justice Brandeis in his opinion held, nevertheless, that the terminal company was a common carrier and stated that the fact that it acted as agent in the performance of its services did not affect its status as a common carrier.

In *Union Stockyard & Transit Co. v. U. S.*, 308 U. S. 213, 84 L. Ed. 198 (1939), the Stockyard Co. sought to be relieved of certain I.C.C. regulations on the ground that it was not a common carrier and that it operated solely as agent under contract to various railroad companies, that it performed no rail services directly or indirectly, and merely provided loading, unloading and terminal facilities for livestock. The court, nevertheless, held the stockyard company was bound by the I. C. C. regulations and a common carrier even though it acted as agent of others in the rendition of its services. The character of service in relation to the public determines whether the service is a public one, and, a common carrier does not cease to be such merely because, in rendering service, it acts as agent of another.

In *Re Rice*, 83 App. D. C. . . . , 165 F. 2d 617 (1947), the court went so far as to hold the lessor of taxicab equipment, colors and facilities a common carrier subject to regulations by the Public Utilities Commission of the District of Columbia (and possibly the I. C. C. for purpose of interstate commerce) rather than regulations of the O. P. A. since he was engaged in the business of a common carrier and this despite the fact the entire operation and contact with the public was with the lessee of the taxicab. In the

Weade case, it is submitted, that Diehmann had much greater participation in the transportation of passengers in interstate commerce and was even under its contract with the Government charged to "arrange for the transportation of passengers".

It is submitted, therefore, that since the agent of a common carrier may itself be a common carrier, that it, too, is subject to the duty to passengers to furnish careful and skillful personnel, in whose protection and care passengers will be entrusted for safe transport. *Shoemaker v. Kingsbury*, 12 Wal. 369, 20 L. Ed. 432; *Stokes v. Saltonstall*, 13 Peters 181, 10 L. Ed. 115.

Sec. 79, Comment a, Restatement, Agency, states as to agents employed by an agent, such as the General Agent here, that the employing agent:

"Is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, *unless he is negligent in their selection.*" (Italics ours)

The Government itself quoted the above with approval on p. 16 of its brief below and also at p. 14 in its brief as *amicus curiae* in *Caldarola v. Eckert*, in this court, No. 625, October Term 1946.

Under these circumstances Respondent is liable under the general law of negligence. A somewhat similar situation was before this Court last term in *Lillie v. Thompson, Trustee*, 332 U. S. 459-461-2, wherein this court reversed *per curiam*. A young woman was employed by a railroad as a telegraph operator in an isolated building in a railroad yard. Late at night she was attacked by an intruder. This court held the railroad should have foreseen this danger, saying:

"That the foreseeable danger was from intentional or criminal conduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it."

The Court cited the *Restatement of Torts*, Sec. 302, *Comment n*, p. 822:

"The actor's conduct may create a situation which affords an opportunity or temptation to third persons to commit more serious forms of misconducts. . . . The actor is required to anticipate and provide against all of these misconducts . . . in all of which it is immaterial . . . that the third persons misconduct is or is not criminal."

To the same effect is the *Restatement of Torts*, Sec. 302, *Comment i*, p. 819;

"If the actor knows or should know that the safety of the situation which he has created depends upon the actions of a particular person or a particular class of persons, he is required to take into account their peculiar characteristics of inattention, carelessness, unskillfulness, or even recklessness or lawlessness if he knows or should know thereof." (Italics ours)

The *Restatement, Agency*, Sec. 350 states:

"*Negligent Action.* An agent is subject to liability if by his acts, he creates an unreasonable risk of harm to the interests of others protected against negligent invasion."

The *Maryland Annotations* to Sec. 350, above quoted states that "The Maryland cases are in accord with the principles of this section" citing *Consol. Gas Co. v. Connor*, (Md.) 78 A. 725 and other cases. The *Virginia Annotations* are likewise in accord citing *Brown v. Parker*, 167 Va. 286; 189 S. E. 339, and other cases. Where the law of both States is in accord, the question of which applies is immaterial (*Egan Chevrolet Co. v. Bruner*, 102 F. (2d) 373, 375)..

If the negligence of Respondent contributed to or had a share in Petitioner's injury it is no defense that another (the Principal) shared in the wrong (*Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; *Carolina R. Co. v. Hill*, (Va.) 89 S. E. 902, 903. Where Respondent's negligence combined with an independent intervening cause, Respondent is liable.

(*Grey v. Kurn*, 137 S. W. (2d) 558; *State v. Haid*, 62 S. W. (2d) 400; *Harrison v. Kansas City Elec. Light Co.*, 93 S. W. 951; 38 *Am. Juris., Negligence*, p. 726, Sec. 60).

Under Maryland law, which was conceded applicable in the Trial Court and below, the Agent is liable. (*Consol. Gas Co. v. Connor*, 114 Md. 140, 78 Atl. 725, 729, 32 LRA (NS) 809, approved in *East Coast Fr. Lines v. Consol. Gas Co.* (Md.) 50 Atl. (2d) 246, 254-5; *Hartland v. Fox*, 79 Md. 514, 527; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 418. *Consolidated Gas Co. v. Connor* (Md.) 78 Atl. 725, 729, above cited disposes of any claim that Respondent's negligence was non-feasance as distinguished from misfeasance, if this distinction can be said to have any lingering vitality. (See the able annotation on this point in a note to the leading case of *Emery Co. v. Am. Refrig. Co.*, 184 N. W. 750, 752, in 20 ALR 97, 99; see also *Mechem on Agency*, Sec. 1465-1472). In the present case it is clear Respondent actually did something in procuring Barnes, the rapist, and the other incompetent crew members as distinguished from mere non-feasance, within the meaning of Mr. Justice Gray's decision in the leading case of *Osborne v. Morgan*, 130 Mass. 102; 39 *Am. Rep.* 437. (See also *Franklin v. May Stores Co.*, 25 F. Supp. 735; *Kentucky-Tenn. Light Co. v. Nashville Co.*, 37 F. Supp. 728, 738.)

For various applications of the doctrine of the liability of agents to third parties see *Nashville R. Co. v. Price* (Tenn.), 148 S. W. 219, Pullman Company liable for selling wrong ticket; *Ill. Cent. R. Co. v. Foulks* (Ill.) 60 N. E. 890; *Eastin v. Texas R. Co.* (Tex.) agent liable for refusing to route cattle over shorter route; *Englert v. N. O. R. Co.* (La.) 54 So. 963, agent liable for obstructing track; *Mixon v. So. R. Co.*, (S. C.), 138 S. E. 45, Pullman Company liable; *James v. Marinship Co.* (Cal.), 25 Cal. (2d) 721, 160 A. L. R. 900; 916, agent not absolved through by-laws of union;

Thompson v. Portland Hotel Co., 239 S.W. 1090, hotel liable for assault of manager.

POINT 4

The Agency Agreement Shows It Contemplates the General Agent Should be Liable to the Public for Its Negligence.

Further, Sec. 16 (a) of the Agency Agreement shows that it was contemplated that Respondent should be liable to members of the public for its negligence in performing the Agreement.

Section 16 (a) provides:

"ARTICLE 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, * * * and including but not limited to claims * * * for damages for personal injury * * *." (R. 91)

The above quotation shows that the agreement expressly contemplated the General Agent would be liable to passengers for personal injury (a) arising out of the operation or use of the vessel or (b) arising out of "the performance by the General Agent of any of its obligations hereunder"

Respondent claimed below in its Reply Brief p. 11 that Sec. 16 (a) refers only to baseless or invalid suits. But a reading of Sec. 16 (a), particularly its reference to costs and attorneys' fees "whether or not the claim be found to be valid", shows it was intended to cover valid suits as well.

The guaranty is referred to in Eckert's Reply Brief p. 33, in *Caldarola v. Eckert*, No. 625, October Term 1946, as "all-embracing so far as the General Agent's own liabilities were concerned."

Compare the above quoted provision with the comparable section of the General Agency Agreement in *Hust v. Moore-McCormick Lines*, 328 U. S. 707, 732; footnote 41.

In this situation the *Restatement of Contracts*, Sec. 145 provides:

"Sec 145. *Beneficiaries under Promises to the United States* * * *

"A promisor bound to the United States * * * by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or failing to do so, unless, (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences."

See also *Illustration 3, Sec. 145*.

Under Maryland Law, conceded applicable below, Petitioner had a right to sue the Agent for breach of contract and the Agent is necessarily liable for its tort in the performance of the Contract (2 *Williston on Contracts*, Sec. 368, footnote 1, p. 1073, 1074; *Mackubin vs. Curtiss-Wright Co.*, 57 Atl. (2d) 318, 320-321; *Mackenzie v. Schorr*, 151 Md. 1, 133 Atl. 821; cf. *Filardo v. Foley Bros.*, 297 N. Y. 217, 225; *Aetna Life Ins. Co. v. Maxwell*, 89 F. (2d) 988, 993). That Respondent owed Petitioner a duty is clear under the authorities cited in *East Coast Lines v. Consol. Gas Co.* (Md.), 50 Atl. (2d) 246, 248, wherein *Consol. Gas Co. v. Connor*, 114 Md. 140, 78 Atl. 725, 729, was cited with approval at p. 254. Under *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 496, Virginia law governs as to conflicts of law, namely as to what law is applicable to Petitioner's cause of action. Under that rule the Trial Court applied Maryland law, as the tort occurred in Maryland waters (R. 29), Interrog. 12, 99). (See *Barnes v. State*, (Md.), 47 Atl. (2d) 50;

Hudson v. Moonier, 304 U. S. 397). But whether under the *Restatement of Contracts*, Sec. 145, the beneficiary is deemed to sue in contract or tort, both Maryland and Virginia law are agreed as to his right to sue (Va.: See 2 *Williston on Contracts*, Sec. 368, footnote 1, p. 1076; cf. *Montgane Mfg. Co. v. Howes Co.*, 142 Va. 301; 128 S. E. 447; cf. *Egan Chevrolet Co. v. Bruner*, 102 F. (2d) 373, 375).² Lastly, if the law of the place where the General Agency Agreement was made determines "the validity and effect of a promise with respect to the nature and extent of the duty" (*Mackubin v. Curtiss-Wright Co.*, (Md.), 57 Atl. (2d) 318, 321) then under the law of the District of Columbia, where the contract was made, Petitioner has the right to sue for Respondent's negligence. (See U. S. cases cited in 2 *Williston on Contracts*, Sec. 368, p. 1073; cf. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220; *Robins Drydock Co. v. Flint*, 275 U. S. 303. In *Caldarola v. Eckert*, 332 U. S. 155, 158, this court referred to the *Robins Drydock* case with the remark that "It is not claimed that an injured party has rights under the agency contract or that it created duties to third parties." The contrary is true here: rights are so claimed on the basis of Sec. 16 (a) of the General Agency Agreement and the general law of negligence announced in the *Restatement of the Law of Contracts*, Sec. 145, above quoted.

POINT 5.

The Circumstances of the Present Case Take it Outside the Doctrine of *Caldarola v. Eckert*.

We take it that this court in *Caldarola v. Eckert*, 332 U. S. 155, 159, did not intend to hold that under any and all circumstances the Agency Agreement prevented the agent being held liable for its own torts. Under the General

Agency Agreement (R. 102) the Respondent had a wide variety of duties for breach of which Section 16 A of the Agreement provides indemnity to the agent by the United States (R. 115). We do not feel nor do we believe the Government will contend that Respondent was a mere ticket-seller whose liability was limited to guaranteeing the genuineness of the pasteboard.

As already seen, Respondent admitted, in answer to petitioner's interrogatory, that it was a carrier, that it offered passage from Norfolk to Washington, to petitioners (R. Interrog. 9, 97, 99). Petitioners' ticket shows that it was "issued by Washington-Hampton Roads Line" by Respondent as General Passenger Agent (R. 22). Petitioners' stateroom card contains a similar statement (R. 23). Respondent, however, disclaims liability by claiming that it offered passage to petitioners "as agents only", (R. 99), and that the ticket shows on its face that the steamship line was operated by the War Shipping Administration.

In answer, we have already cited authorities to the effect that an agent is liable for its own torts, equally with the principal. In offering passage to petitioners, Respondent, as general agent, guaranteed the safety of the voyage if under its General Agency Agreement it had obligations with respect to the safety of the voyage.

We think such obligations flow from the general responsibility of carriers offering passage by ship to the public and also the very direct provisions of the agreement as interpreted and applied by Respondent (See *The R. Lanahan Jr.*, 43 F. (2d) 858, 862; *U. S. v. Shea*, 152 U. S. 178, 186; *The Charlotte*, 285 F. 84, Aff. 299 F. 595).

Article 3 A of the Agreement provides that Respondent shall

"(a) *maintain the vessels* in such trade or service as the United States may direct." (R. 103).

Article 3 A (c) provides that Respondent shall

"equip, victual, supply and *maintain the vessels*." (R. 82)

Article 3 A (d) provides that the General Agent shall procure the members of the crew

"in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service." (R. 82)

The addendum to the Agreement, Part II, added July 30, 1945, provides for passenger service. It states that vessels are allocated by the United States to the General Agent "to conduct as agent of the United States" (R. 95). Section 3 A is amended to read that Respondent

"(f) shall arrange for the transportation of passengers." (R. 96)

• To arrange for the transportation of passengers means something more than merely selling a passenger a ticket. A natural duty required Respondent in arranging for such transportation to see to it that the passengers were safely carried.

The responsibility of the General Agent for discipline aboard ship is shown by Directive No. 1 of the War Shipping Administration dated October 8, 1942, reading as follows:

"WAR SHIPPING ADMINISTRATION

Washington

October 8, 1942

DIRECTIVE NO. 1

To All General Agents and Agents of Vessels Owned by or Chartered to the War Shipping Administration

A frequent and most serious criticism of the American merchant marine has been the lack of discipline

aboard ship, both at sea and in foreign ports. The War Shipping Administration is alarmed that these conditions continue in the face of the present war situation. Lack of discipline and order aboard ship is intolerable. It cannot be allowed to continue.

The deterioration of the authority of the Master and licensed officers is the principal cause for the breakdown in discipline. It is essential that this authority be restored immediately and maintained.

All Masters have been instructed to report serious breaches of discipline to the operating agent of the War Shipping Administration subsequent to the commitment of the violation. (Italics ours; quoted from Brief on certiorari of petitioner in *Caldarola v. Eckert*, #625, October Term 1946. Defendant's Exhibit 6.)

The object of Directive No. 1, above quoted, was to produce action by the Agent termed therein the "operating agent". The directive is made directly applicable to the Agent by reason of Article 2 of the General Agency Agreement, (R. 82), under which the General Agent undertakes to conduct the business in accordance with the "directions, orders or regulations" of the United States. Also, Directive No. 1, dated as it is October 8, 1942, shows a contemporaneous construction of the type of contract involved herein, GAA 4-4-42 (R. 81). Indeed the present contract dated January 9, 1943, must be deemed in point of law to have been entered into subject to the obligations of Directive No. 1 above quoted, relative to the Agent's responsibility for discipline and order aboard ship.

As we have seen, Respondent was entirely negligent on this score in respect to (a) selecting without investigation a cook (the rapist) with a criminal record (R. 28-29, 57-60, 75-76, 106-07); (b) procuring as watchman a person inexperienced and incapable whose main duty was to fix slot machines, his activities as watchman being limited to hourly tours and interim sleep (R. 111, 116); (c) the procuring of the watchman thus holding two positions and drawing compensation from an outside source, which was in viola-

tion of Coast Guard rules and regulations (R. 110-112); (d) in not procuring the required number of watchmen required by Coast Guard rules and regulations (R. 38-40, 46, 110); (e) in failing to see that "company rules" with regard to drinking by crew members were enforced (R. 41-42).

Allen Smith, President of the Respondent Company, testified it "ran the line and directed its operations, both in a general way and responsible for the details" (R. 105-106). He said that Respondent was "General Steamship Agents, operators" (R. 55) and that "they operated under Coast Guard regulations" (R. 109). He stated "they were paid for operating the line" (R. 66, 107). Barnes, the rapist, was directly employed by Mr. Bell of Respondent Company, not the United States, and hired on board the ship itself (R. 74). Mr. Smith, the Company's President, stated that he was not only authorized to hire but to discharge the employees of the vessel (R. 107) which implies a continual supervision over them. He said "if we found any man who did not perform his duty properly, we let him go without the slightest ceremony at all" (R. 106). If a man did not perform his duties, Respondent fired him (R. 107).

The Master of the ship looked to the Company for instructions, rules and regulations and was subservient to the Company (R. 42, 55, 106, 109, 112).

The watchman—slot machine fixer looked to the Respondent for instructions (R. 111-112).

Although the General Agency Agreement provides in Article 2 (R. 82) that the General Agent undertakes to "manage and conduct the business for the United States" in accordance with such directions, etc. as the latter may prescribe (R. 82), the War Shipping Administration gave no such directions outside of a direction for the handling of money, irrelevant here. The provision of the Agreement

in paragraph 3 A (d) that the Master should have "full control, responsibility and authority with respect to the navigation and management of the vessel" (R. 82-83) simply stated the general Maritime Law under which the Master has an overriding responsibility for "the management of the vessel"; i. e., the ship itself when it is at sea. (*The Oregon*, 158 U. S. 186). Such a provision has no bearing on the legal responsibility of the General Agent, whose duties "to manage and conduct the business of the United States" are set forth in Article 2 (R. 82) and recognized by Article 16 A (R. 91) wherein the United States agrees to indemnify the General Agent for "injury to persons or property * * * arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder."

The totality of Respondent's duties² sharply distinguishes the present case from the *Caldarola* case wherein this Court held that under a provision in the contract that the Government "shall furnish and maintain in good working order all necessary equipment" (332 U. S. at page 156) there was no duty on the part of the agent to a stevedore unless it was in possession and control of the premises (*Caldarola* opinion, at page 158).

Respondent's road to escape on the ground that it was merely an "agent" of the United States is blocked by the fact that clearly under the Agreement it owed duties to passengers over and above the duty of a mere ticket-seller. As said in 9 American Jurisprudence, page 447: "A common

² See the enumeration of these duties in Petitioners' brief on the merits in *Caldarola v. Eckert*, No. 625, October Term 1946, p. 20-30; also Mr. Justice Douglas' concurring opinion in *Hust v. Moore-McCormick Lines*, 328 U. S. 707, 734, wherein concurred in by Mr. Justice Black, he states "the business of managing and operating the vessel was the business of the company." (p. 738)

carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another."

If the general agent bound itself by contract exclusively to manage and conduct the business of the vessel, arrange for the transportation of passengers, equip, victual, supply and maintain the vessel, it created the risk that its failure to perform its obligation might cause injury to innocent third parties, particularly passengers. Consequently, the general agent is under the duty to such parties to save them harmless from that risk. For the negligent breach of that duty the law imposes liability on the agent (*Hudson v. Moonier*, 102 Fed. (2d) 96, 99, C. C. A. 8; *Murray v. Cowherd*, 148 Ky. 591; see also *Osborne v. Morgan*, 130 Mass. 102, 2 Am. Jur., Agency, Section 333, p. 262).

It has been long establish that the right of a ship owner to limit its liability is dependent upon his want of complicity in the acts causing the disaster and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service. (*McGill v. Michigan S. S. Co.*, (C. C. A. 9, 1906) 144 Fed. 788; *The Elton*, (C. C. A. 3, 1906) 131 Fed. 562, 142 Fed. 367; *The Cygnet*, (C. C. A. 1, 1903) 126 Fed. 742.

Where competent, careful and safe employees are required to accomplish an undertaking it is negligence on the part of the person procuring and selecting them not to procure and select such persons having such qualifications, which negligence renders them liable to persons for injuries occasioned thereby. (*Shoemaker v. Kingsbury*, 79 U. S. 369; *Holladay v. Kennard*, 79 U. S. 254; *Nieto v. Clark*, Fed. Case #10262 (C. C. Mass.); *Gallena v. Hot Springs R. Co.*, 13 Fed. 116. A United States publication *Postal Decisions*, 1939, p. 445 states:

"A postmaster is not responsible for the default or misfeasance of his clerks or assistants unless it be shown that he was *negligent in failing to select suitable and competent persons for such duties*, *Dunlop v. Monroe*, 11 U. S. 242; *Bolom v. Williamson*, (ac) 2 Bay 551; *Wiggins v. Hathaway*, (N. Y.) 6 Bart 632; *Schroyer v. Lynch*, (Pa.) 8 Watts 453; *Raisler v. Oliver*, 97 Ala. 710; *Keenan v. Southworth*, 110 Mass. 474; or that the postmaster was *negligent in failing to properly supervise* * * *." Where he is negligent in either respect mentioned, he is liable.

Conclusion.

The judgment below should be reversed.

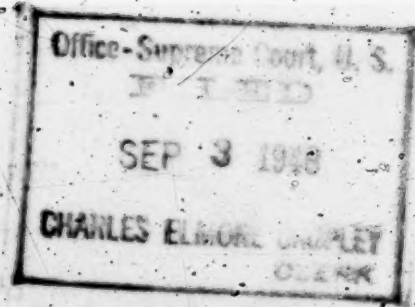
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No. 179

In the Supreme Court of the United States

OCTOBER TERM, 1948

**LILLIAN A. WEADE, FREDERICK M. WEADE and ROBERTA L.
STINEMEYER, *Petitioners,***

v.

DICHMANN, WRIGHT & PUGH, INCORPORATED.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LEON T. SEAWELL
Attorney for Respondent

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OPINIONS BELOW

The opinion letters of the District Court of the United States for the Eastern District of Virginia (R. 29-31) are not reported. The opinion of the Court of Appeals for the Fourth Circuit (R. 234-238) is reported in 1948 A. M. C. 1153.

JURISDICTION

The decree of the Court of Appeals for the Fourth Circuit was entered May 13, 1948 (R. 239). The petition for certiorari was filed July 27, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in the special circumstances of the case respondent violated any duty to petitioners by failing to exercise due care in performing its contractual obligation to the United States to procure proper and sufficient persons for employment by the United States as civilian government seamen on a government vessel operated by the United States and husbanded by respondent.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations relating to the status and control of War Shipping Administration seamen, i. e., Revised Statute 1753 (5 U. S. Code 631), together with the applicable Civil Service Rules and War Shipping Administration Operations Regulations No. 12, Supplement No. 1 and No. 15 Directive No. 2, are set forth in Appendix A, *infra*, pp. 16 *et seq.* Other related Operations Regulations are summarized in Appendix B, *infra*, pp. 22 *et seq.*

STATEMENT

Respondent Diehmann, Wright & Pugh, Inc., was a ship's husband or general agent employed by the United States under the wartime standard form GAA 4-4-42 serv-

ice agreement to manage and conduct the accounting and certain other shoreside business operations of the SS METEOR and other vessels owned and operated by the United States through the War Shipping Administration (R. 102-122).¹ With respect to the manning of the vessel, Article 3 A' (d) of the wartime standard form agreement (R. 104) provided:

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.

By reason of such employment on a War Shipping Administration operated vessel, the master and crew of the METEOR were technically civil service employees of the United States in the unclassified service exempt from examination under Section xxi (1) of Schedule A to the Civil Service Rules (5 Code of Fed. Regs., 1943 Cum. Supp., p. 1488, sec. 50.21 (Ex. O. No. 9004, December 30, 1941, 7 Fed. Reg. 2)). With respect to the transportation of passengers

¹ War Shipping Administration Form GAA 4-4-42, 7 Fed. Reg. 7561, 7562; 46 C. F. R., 1943 Cum. Supp., p. 11427, sec. 306.44.

by the United States, Article 3. A. (f) of the wartime standard form agreement (R. 121) restricted the duties of respondent respecting their transportation as follows:

(f) Shall arrange for the transportation of passengers when so directed, and issue or cause to be issued to such passengers customary passenger tickets. After a uniform passenger ticket shall have been adopted by the United States, such passenger ticket shall be used in all cases as soon as practicable after receipt thereof by the General Agent. Pending the issuance of such uniform passenger ticket, the General Agent may continue to use its customary form of passenger ticket.

Respondent was thereby confined to issuing tickets and arranging with the ship masters, to whom the War Shipping Administration entrusted its vessels, for the transportation of such passengers.

Originally petitioners brought two separate suits against respondent alone² and petitioner Lillian A. Weade brought a separate suit against the United States alone.³ Recovery of damages was sought in each instance because of certain occurrences which took place while petitioners Lillian A. Weade and Roberta L. Stinemeyer were passengers aboard the METEOR. The suit against the United States was held in abeyance while the two suits against respondent were ordered consolidated for trial (R. 13) and gave rise to the present proceedings.

² *Roberta L. Stinemeyer v. Dichmann, Wright & Pugh, Inc., and George C. Hudgins*, United States District Court, Eastern District of Virginia, Norfolk Division, Civil No. 616, and *Lillian A. Weade and Frederick M. Weade v. Dichmann, Wright & Pugh, Inc., and George C. Hudgins*, United States District Court, Eastern District of Virginia, Norfolk Division, Civil No. 617.

³ *Lillian A. Weade v. United States of America*, United States District Court, Eastern District of Virginia, Newport News Division, Admiralty No. 80.

The complaints against respondent alleged that the METER was operated by respondent as a common carrier and that petitioners were injured because of respondent's failure to provide protection for respondent's sleeping passengers against the personal misconduct of respondent's employees, because of respondent's failure to use due care to select competent and careful employees, and because of respondent's failure to provide reasonable safeguards for the protection of passengers on the vessel and comply with the laws relating thereto. (Weade, para. 2, R. 2; Stinemeyer, para. 2, R. 8). Respondent answered denying generally the charges of negligence and want of care and in particular denying that it was a common carrier or that it owned or operated the vessel (R. 5, 10) or that the master, officers and crew of the vessel were its employees (R. 5-6, 11). Respondent alleged that, on the contrary, the METER was operated by the United States of America, War Shipping Administration, that it was manned by government employees, and that respondent's only relation to the vessel was that of general agent servicing the vessel in accordance with the provisions of the standard form of agency agreement (R. 5-6, 11-12).

The facts which gave rise to petitioners' claims against respondent can be briefly summarized. Petitioners Lillian A. Weade and Roberta L. Stinemeyer were passengers on the SS METER, a vessel owned and operated by the United States through the War Shipping Administration, between Norfolk and Washington. In accordance with Article 3 A (f) of the agency agreement (R. 121), respondent, as agent for the United States, sold and issued to Mrs. Weade and Mrs. Stinemeyer tickets in the standard form prescribed by the War Shipping Administration. This standard form of ticket (R. 27) expressly stated that it was "issued by Washington-Hampton Roads Line, operated by United States of America, War Shipping Administration."

and the name of respondent as printed on the ticket plainly indicated that it was not operator of the METEOR, but was merely agent for the United States in issuing the ticket and arranging for the transportation. Mrs. Weade and Mrs. Stinemeyer retired to their stateroom about 11:00 p. m., the night of August 3, 1945, Mrs. Stinemeyer taking the upper berth and Mrs. Weade the lower. The weather was hot and they attempted to obtain the maximum ventilation. Despite the warning notice posted in the stateroom that passengers must keep the windows or shutters closed during the night, Mrs. Weade and Mrs. Stinemeyer left the door into the passageway ajar and also left open the window, which looked out upon the boat deck, leaving both the glass and the shutter open and down. About three o'clock of the following morning, a man entered the room by way of the open window, assaulted Mrs. Weade and left the room by the same window. The second cook of the vessel, a negro named Jack Lester Barnes, was subsequently tried, convicted and executed for the offense.

Concerning any negligence or fault on the part of respondent or its own shoreside employees the record is barren of evidence. There was no evidence to support petitioners' charge that respondent was negligent in procuring the colored cook for employment. He afterward proved to have had a criminal record (R. 168-171) but there was no evidence that this was known or should have been known to respondent. He was furnished to respondent by the Government from the pool maintained by the War Shipping Administration Recruitment and Manning Organization for the benefit of general agents in performing their duty of procuring men for government vessels (R. 92). He had been approved by the W. S. A. and the Coast Guard and no reason for an additional investigation by respondent was known (R. 77, 78). It appears that the

night of the occurrence Barnes had been drinking which was contrary to the regulations of "the company" as well as the United States (R. 58-59). But there was no evidence that he had done so before or that the Government's shipmaster, much less respondent's shoreside personnel, was aware of such conduct. On the contrary, so far as was known, Barnes was unusually quiet and orderly (R. 93). Nor was there any evidence in support of petitioners' charge that respondent had failed to procure proper or sufficient watchmen. The watchman assigned by the master to the deck where the stateroom of Mrs. Weade and Mrs. Stinemeyer was situated possessed the proper seaman's certificates (R. 98, 222). He was properly instructed by the Government's master and officers in his duty to patrol inside and outside every twenty to thirty minutes and remain alert and appears to have done so (R. 99, 223-225). While some question was raised on cross-examination of the master as to the sufficiency of the number of watchmen (R. 55-57) there was no evidence that the master had requested and respondent had neglected to procure additional men when so requested.

The trial court instructed the jury that the relation of respondent to petitioners was that of a common-carrier which owed Mrs. Weade and Mrs. Stinemeyer the duty to "use the utmost or highest degree of practicable care and diligence" and that respondent "was the principal and operator of the steamship METEOR at the time in question" (R. 16-17, 20). A verdict against respondent resulted and a motion for judgment notwithstanding the verdict was denied, the district judge holding that "While the case of *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, is not precisely in point, it is my view that it is controlling" (R. 29). Judgment for petitioners was entered accordingly (R. 32). On appeal, the court below reversed, in an opinion

which held that respondent was not liable to passengers since it was not operating the vessel nor subject to the duty of a common carrier (R. 234-238). The court observed that if the lesser duty owed to an invitee was not to be attributed to the agent, under *Caldorola v. Eckert*, 332 U. S. 155, *a fortiori* the more onerous duty owned by a carrier to a passenger should not be here. The opinion did not discuss petitioners' contentions that respondent was negligent in performing its contractual duty to the United States and that petitioners are entitled to recover for damages alleged to have resulted therefrom.

ARGUMENT

Petitioners concede (Pet. 16) they cannot charge respondent with vicarious liability for negligence of the civil service master, officers and crew with which the United States manned, navigated and physically managed the METEOR nor hold respondent liable for defective or dangerous conditions aboard a government-owned and operated vessel for which respondent was only ship's husband or shoreside agent. According to petitioners the issue here is "whether the general agent owed a duty to passengers and whether it was negligent in the fulfillment of that duty, which neglect proximately caused injury to the petitioners" (Pet. 16). It is common ground to petitioners and respondent, no less than to the United States as *amicus curiae* in the court below, that under *Brady v. Roosevelt SS. Co.*, 317 U. S. 575, government agents are liable for the actionable negligence of their own sub-agents and employees. But petitioners additionally contend (Pet. 3, 5, 7, 11) that they are entitled to recover from respondent if the latter can be found to have failed properly to perform its contractual duties to the United States to "procure and make available to the Master for engagement by him the officers,

and men required by him to fill the complement of the vessel" (R. 104) and to "arrange for the transportation of passengers when so directed" (R. 121). Petitioners argue that despite this Court's decision in *Caldarola v. Eckert*, 332 U. S. 155, the facts of this particular case are such that "the record clearly discloses sufficient bases for holding the general agent owner *pro hac vice* in possession and control of the vessel insofar as passengers are concerned" (Pet. 14). We submit that the issue raised by petitioners lacks substance as well as importance and that, having regard to this Court's decisions in *Robins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 307, and *German Alliance Ins. Co. v. Home Water Co.*, 226 U. S. 220, 227, the court below correctly applied the *Caldarola* decision as fully dispositive of every question which is actually presented by the record in this case.

I. The heart of petitioners' contentions here is that the court below erred in failing to find that the equivalent of a carrier-passenger relationship existed between petitioners Lillian A. Weade and Roberta L. Stinemeyer, on the one hand, and respondent Diekmann, the Government's shoreside agent, on the other (Pet. 10-11, 12, 16). In aid of this contention petitioners repeatedly characterize respondent as "operating the vessel" (e.g. Pet. 3, 8, 14). Without regard to the fact that these supporting assertions by petitioners are contrary to the record, we submit that the effect of the wartime GAA 4-4-42 agreement on the rights of third parties transported by the United States as passengers aboard government-operated vessels presents no question which has not already been fully settled by this Court. *Caldarola v. Eckert*, 332 U. S. 155, is completely dispositive of the issue raised by petitioners. There, this Court plainly indicated that an injured third person could not claim that he "has rights under the agency con-

tract or that it created duties to third persons, *Robins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303. * * * so the narrow question is whether the agents were in possession and control of the *EVERAGRA*" (332 U. S. at 158). And, as the court below pointed out (R. 236-237), this Court emphatically indicated that by its previous decisions: "The Court did not hold that the agency contract made the agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States" (332 U. S. at 159). It can make no difference that the third persons who are petitioners in this present case are more particularly passengers transported on the vessel pursuant to their contracts with the United States.

Nor is the agent's responsibility to passengers transported by the War Shipping Administration a matter of great public importance requiring decision by this Court (Cf. Pet. 8). The *Caldarola*, *Robins* and *German Alliance* cases appear dispositive and there is no conflict in the lower courts.⁴ Petitioners concede that this appears to be a case of first impression (Pet. 6) and we are informed by the Department of Justice that only in four other instances have passengers brought independent suits against the agents of the Government. Of those, the Department's records show only two have thus far omitted to sue the

⁴ The concurrence of the circuit courts is unanimous. *Publicker Industrial Alcohol Co. v. American-Hawaiian S.S. Co.*, 165 F. 2d 1002 (suit by dock owner to recover for damages resulting in part from breach of agent's duty to Government to order sufficient tugs to safely undock vessel). Cf. *McGowan v. J. H. Winchester & Co.*, 1948 A. M. C. 1133 (C. C. A. 2); *Palardy v. American-Hawaiian S.S. Co.*, decided August 4, 1948 (C. C. A. 2), suits by longshoremen and harbor workers.

Suits by passengers on government vessels are under the supervision of the Admiralty and Shipping Section of the Department and reports are received in respect of suits against agents as well as those against the United States itself. Pursuant to the agency agreement, the United

United States as well and in both the statute of limitations has over a year to run.⁶ All others, like petitioner Lillian A. Weade here, have also filed suit against the United States and there can be no doubt of their right to recover from the United States if actionable negligence in the performance of the Government's work be proven.⁷ It is immaterial whether the fault be that of the Government's civil-service master and crew or of the shoreside employees of the Government's agent. We accordingly submit that petitioner's application for certiorari presents no question requiring decision by this Court.

2. Petitioners urge that a reversal of the judgment below is compelled by the reasoning which motivated the decisions of this Court in *Brady v. Roosevelt*, 317 U. S. 575, and *Hust v. Moore-McCormack*, 328 U. S. 707 (Pet. 10, 12, 14). Petitioners seem to argue that those decisions establish that the legal rules of principal and agent, which regulate the liability to third parties of the agent for a disclosed private principal,⁷ are modified so as to impose liability for breach of the agent's contractual obligations to his principal when the principal is the United States (Pet. 11, 16). In support of this argument, petitioners cite the language of Mr. Justice Douglas dissenting in the *Caldarola*

States is obligated for any recovery effected, whether by reason of the actionable negligence of the Government's master and crew or of the agent's shoreside employees, to the extent not covered by insurance (GAA 4-4-42, Arts. 8 and 16 (R. 110, 115)). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the losses (House Merchant Marine and Fisheries Committee, Doc. No. 4, *Compilation of standard contract forms of the War Shipping Administration*, p. 847). The defense of such actions, whether against the agent or the United States, is undertaken by the Department of Justice whenever required by the public importance of the question involved.

⁶ Enactment of the Government-seamens Relief Bill, H. R. 4873, 80th Cong., which passed the House too late to be acted on by the Senate before adjournment, will remove any danger that the right to sue the United States may become time barred. It extends the statute of limitations one year for any litigant whose suit is dismissed as improperly brought against the Government's agent.

⁷ Cf. *Restatement of Agency*, §§ 343, 350, 352.

case (332 U. S. at 161) that "it is shocking to find private operators getting immunity in this manner for their traditional liability for tort claims" (Pet. 15). Petitioners imply that respondent here was an "operating agent" for the *METOR* and conclude that this Court intended that it should be liable to third parties, particularly passengers, for negligent breach of its contractual obligations (Pet. 15).

But petitioners' argument is without foundation in the record. Unlike the situations presented in the *Brady* case, where the contract made Roosevelt "operating agent" for the vessel and was substantially a demise, and by the record in the *Hust* case, where the answer of Moore-McCormack admitted that it was the operator of the vessel (October Term 1945, No. 625, R. 6), which concession was accepted without discussion by a four-judge majority of this Court (see 328 U. S. at 717, 718, 720, 721, 724, 727, 730, 732), the record in this present case plainly shows respondent was not operating the vessel.⁸ Here respondent's answers denied that it was operating the vessel (R. 5, 10) or that the master, officers and crew of the vessel were its

⁸ It is not true, as petitioners imply (Pet. 6-7, 12, 14), that general agents husbanding the Government's vessels under the wartime GAA 4-4-42 agreement performed substantially the same functions as the operating agents to whom government vessels were formerly demised for operation under the four special peacetime "operating agreements" involved in *Brady v. Roosevelt SS. Co.*, 317 U. S. 575; *Quinn v. Southgate Nelson Corp.*, 121 F. 2d 190 (C. C. A. 2), certiorari denied 314 U. S. 682; and *Odgaard v. Cosmopolitan Shipping Co.*, 171 Misc. 244, 12 N. Y. S. 2d 389. On the contrary, the general agent's authority stops at the water's edge, for it is a mere ship's husband to manage and conduct the accounting and certain other shoreside business operations of the Government's vessels. See *Aird v. Weyerhaeuser SS. Co.*, decided August 4, 1948 (C. C. A. 3), slip opinion 2-3; *Gaynor v. Aguilines*, decided August 4, 1948. (C. C. A. 3) slip opinion 8-9. And see letter of the General Counsel, U. S. Maritime Commission, to Assistant Attorney General Sonnett, Reply Brief for Respondent Thor Zekert & Co., *Caldwara v. Eckert*, No. 625, Oct. T., 1946, Appendix, pp. 43-66. Operation of the vessels themselves is directly by the United States and it is expressly provided that "the Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel" and "the officers and members of the crew shall be subject only to the orders of the Master" and not of any other government agent (GAA 4-4-42, Art. 3 A (d), R. 104).

employees (R. 5-6, 11). It alleged that, on the contrary, the METEOR was operated by the United States of America, War Shipping Administration, and that respondent's only relation to the vessel was that of general agent servicing the vessel in accordance with the provisions of the wartime standard form of agency agreement (R. 5-6, 11-12). We submit that on these facts, the extent of respondent's liability is fixed by *Caldarola v. Eckert*, 332 U. S. 155, where this Court recognized that under the rule in *Robins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 307, third persons can gain no rights against the Government's agents by reason of the latter's contract with the United States and that general agents or ships' husbands employed by the United States to manage the accounting and certain other shoreside business operations of its vessels in accordance with the wartime standard form GAA 4-4-42 agreement do not thereby become owners *pro hac vice* or operators of government vessels. They are not, like the operating agent in *Brady*, nor as had been mistakenly conceded by the agent in *Hust*, operating the vessel for the Government⁹ so as to be liable as employer *pro hac vice* of their civil-service masters and crews (Cf. 328 U. S. 723-724).

Thus, the essential problem presented by the effect of the wartime GAA 4-4-42 agreement on the rights of passengers transported by the United States aboard its vessels has already been fully explored so far as the needs of this case are concerned. It is well established that a contract vio-

⁹ Petitioners gain nothing because the applicable War Shipping Administration regulations which complement the wartime 4-4-42 agreement were not placed in evidence (Pet. 4, 13). The burden of proving respondent's relation to the vessel was upon petitioners, plaintiffs below, not on respondent. But petitioners cannot take advantage of their omission. Government regulations are noticed judicially and those of the W. S. A. demonstrate conclusively that general agents are employed only to attend to the accounting and certain other shoreside business operations of the vessel so that their authority stops at the water's edge. The United States Maritime Commission has supplied a summary of those particularly applicable which is printed in Appendix B, *infra*, p. 22.

lation does not furnish a basis for tort liability to third persons, but the act which violates the contract must be a negligent one which, of itself, creates liability because, the contract aside, a duty is owing to such third persons. *German Alliance Ins. Co. v. Home Water Co.*, 226 U. S. 220, 227; *Moch Co. v. Rensselaer Water Co.*, 247 N. Y. 160, 167; *Christianson v. Breen*, 288 N. Y. 435; *Knight v. Atlantic Coast Line RR. Co.*, 73 F. (2d) 76, 77 (C. C. A. 5); *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286, 289-290 (C. C. Mo.); *Floyd v. Shenango Furnace Co.*, 186 Fed. 539 (C. C. Minn.). On the record here it does not appear that respondent owed a duty to third persons, such as petitioners, to procure suitable seamen for employment by the United States nor does it even appear that respondent failed properly to perform the very limited duty of procurement which it owed the United States under the contract. Petitioners present neither argument nor authority that one acting as an agent to sell and issue tickets on behalf of a carrier is liable to the passengers for the negligence of the carrier's employees. Nor is there any better support for petitioner's contention that one acting as an agent to procure workmen for employment by another is liable to the other's invitees should the workmen prove unsuitable and harm result. Were these contentions of petitioner correct, agencies for railway and theater tickets, employment agencies and union hiring halls could no longer function. The unlimited character of such liability would render their operation impossible.

We submit it is thus clear that the court below correctly held that respondent, as general agent, had no liability to petitioners on their claim for negligence herein. Nor can it be successfully contended that the decision did not result from a proper consideration of the applicable decisions of this Court.

CONCLUSION

The decision below is clearly correct and there is no conflict or other occasion for review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

LEON T. SEAWELL

Attorney for Respondent.

August 1948

APPENDIX A

TEXT OF STATUTES AND REGULATIONS

1. Revised Statute 1753 (5 U. S. C. 631), authorizing the President to prescribe regulations regarding civil service employment, provides:

The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

2. The Civil Service Rules and Schedules, as codified in Title 5, Code of Federal Regulations (1943 Cum. Supp. pp. 1441, 1488), provide in pertinent part as follows:

CIVIL SERVICE RULE H

SECTION 2.1 *Extent of the classified service.*—The classified service shall include all persons who have been heretofore or may hereafter be given a competitive status in the classified civil service with or without competitive examination, by legislative enactment, or under the civil service rules promulgated by the President, or by Executive orders covering groups of employees with their positions into the competitive classified service or authorizing the appointment of individuals to positions within such service. It shall include all positions now existing or hereafter created by legislative or Executive action, of whatever function or designation, whether compensated by a fixed salary or otherwise, unless excepted from classification

by specific affirmative legislative or Executive action. No right of classification shall accrue to persons whose appointment or assignment to classified duties is in violation of the civil service rules. [E. O. 7915, June 24, 1938, effective Feb. 1, 1939; 3 F. R. 1519.]

SECTION 2.3 *Exceptions from classification.*—(a) Positions in Parts 50 and 51 are excepted from the classified service.

(b) Appointments to the excepted positions named in Part 50 may be made without examination or upon noncompetitive examination. [E. O. 7915, June 24, 1938, effective Feb. 1, 1939, as amended by E. O. 8083, Apr. 10, 1939, effective May 1, 1939; 3 F. R. 1519, 4 F. R. 1577.]

SECTION 50.6. *Certain positions excepted from examination under § 2.3.*—The positions designated in this part are excepted from examination, but not more than one position shall be treated as excepted under any title unless a different number of positions be indicated (Rule XVI, sec. 1; E. O. 209, Mar. 20, 1903, 5 C. F. R. 16.1) [Regs. CSC, as of June 1, 1938].

§ 50.21. *United States Maritime Commission.*—(a) All positions on Government-owned ships operated by the United States Maritime Commission [E. O. 9004, Dec. 30, 1941; 7 F. R. 2],

NOTE: These positions were transferred to the War Shipping Administration by E. O. 9054; 7 F. R. 837.

3. War Shipping Administration Operations Regulations No. 12, Supplement No. 1 and No. 15, Directive No. 2, provide as follows:

OPERATIONS REGULATION NO. 12

SUPPLEMENT No. 1, OCTOBER 7, 1944

Pertaining to All Vessels Owned by or Under Charter to the War Shipping Administration (Dry-Cargo and Passenger Vessels, Tankers, Colliers, and Small Craft)

Subject: Employee Status of Certain Personnel Employed by Agents.

This Supplement No. 1 to Operations Regulation No. 12 is issued for the purpose of clarifying the employment status of certain personnel employed by Agents in the conduct of the business of vessels or their cargo under the GAA, TCA, and BA agreements. It is clear from the provisions of Article 3 (d) of the General Agency Service Agreement that Master and crew members are employees of the United States but, no specific provision is made in the GAA, TCA, or BA agreements as to whether other personnel are employees of the United States or of the Agents, General Agents, or Berth Agents. Reading the provisions of the agreements as a whole it is also clear that, except for the Master, officers, and crew, persons employed by an Agent, General Agent, or Berth Agent are employees of such Agents and not of the United States.

1. Excepting only additions to the vessel's crew and employees of independent contractors, personnel employed by General Agents pursuant to Operations Regulation No. 12 and employees of the General Agent and not of the United States. Other personnel directly employed by Agents, General Agents, and Berth Agents, (and their Sub-Agents) to perform work in connection with vessels or their cargo and special work incident thereto, including shore gangs, checkers, tallymen, watchmen, guards, coal trimmers, and other extra labor, but excluding relief officers, shore relief, and crew members, are employees of such Agents and not of the United States.

2. The direct labor costs of the employees of Agents referred to in paragraph 1 shall be paid for from the corporate funds of the Agents, and, in accordance with Article 7 of the service agreements, the Agent may reimburse himself for such expenses from the special bank account established for use in connection with the service agreements. Such costs shall include, but without limitation, taxes (employer's contributions only) payable pursuant to the Federal Insurance Contributions Act (OAB tax) and to any state or federal unemployment insurance law in respect of the direct labor to which the same may be applicable; and premiums on workmen's compensation insurance carried pursuant to the Federal Longshoreman's and Harbor Workmen's Compensation Act and any state workmen's compensation laws in respect of the direct labor to which the same may be applicable. Such costs shall not include compensation for supervisory services or overhead of the Agent.

3. With respect to the work performed by the employees of Agents referred to in paragraph 1, the Agent shall be indemnified to the full extent provided under the applicable service agreement, regardless of the fact that the employees in question are employees of the Agent and not of the United States.

4. The interpretation and instructions contained in this Regulation need not be applied retroactively by the Agents.

(Sgd.) G. H. Helmbold,
G. H. Helmbold,

Assistant Deputy Administrator for Ship Operations.

OPERATIONS REGULATION NO. 15

DIRECTIVE No. 2, OCTOBER 8, 1942

The War Shipping Administration has been in receipt of frequent complaints about the lack of discipline and

the prevalence of disorder on United States flag vessels and other vessels owned and operated by the United States government. In this time of gravest national peril, it is intolerable that just and lawful discipline should not be maintained.

The War Shipping Administration expects the Master and his officers to maintain discipline on board all vessels.

All operators have been instructed by the War Shipping Administration that failure to support the Master and his officers in the lawful execution of their duties will not be tolerated.

To this end you are advised that:

1. The Master of a vessel has full discretion in signing on crew members and may reject any person seeking employment. This power carries with it both the legal and moral obligation to use it judiciously and only for proper cause.

Records shall be kept of the names of those rejected and of the reason for rejection and shall be submitted to the port office of the Recruitment and Manning Organization of the War Shipping Administration in the port in which the rejection occurs.

2. Upon every departure from any port, Masters are instructed to search the quarters and personal effects of all members of the crew, and to confiscate all liquor, weapons, and any equipment that in the judgment of the Master would endanger the crew, cargo or ship.

3. All complaints and disputes that cannot be settled to the satisfaction of all parties shall be held in abeyance, without prejudice, until the next arrival at a United States port; in no event shall any such dispute be allowed to interfere with the full performance of their duties by

all members of the crew, and that failure to observe this requirement shall constitute grounds for disciplinary action.

4. All Masters are instructed to keep the log book in such fashion that it shall record all acts and occurrences relevant to the question of the preservation of good order and discipline. All serious breaches of discipline shall be reported to the operating agent of the War Shipping Administration in the first port touched after the violation has been committed.

(Sgd.) E. S. Land

E. S. Land

Administrator.

APPENDIX B

UNITED STATES MARITIME COMMISSION
WASHINGTON

August 18, 1948

Leon T. Seawell, Esquire
Hughes, Little & Seawell
Wainwright Building
Bute & Duke Streets
Norfolk 1, Virginia

Dear Mr. Seawell:

This will refer to the request of the Department of Justice in connection with the case of *Weade v. Dichmann, Wright & Pugh, Inc.*, that the Maritime Commission, as successor to the War Shipping Administration, supply information concerning the applicable Operations Regulations governing the duties of general agents under the war-time standard form GAA-4-4-42 agreement.

It must be understood at the outset that general agents were mere ship's husbands limited to the performance of shoreside business operations under detailed supervision of the War Shipping Administration and to serving as the principal channel of communication between the War Shipping Administration officials and the masters and crews with which the United States manned, navigated and physically managed its vessels. The GAA 4-4-42 agreement made the agent's every action subject to "such directions, orders, and regulations" as the Government should prescribe. And in fact, agents' activities were controlled in the most minute detail through extensive series of "general orders," "operations regulations," "travel regulations," "fiscal regulations," "auditing and accounting instructions," "insurance instructions," "legal bulletins," and "medical directives" issued by the respective units of

the War Shipping Administration pursuant to the provisions of Article 2 of GAA 4-4-42.

Supervision and compliance was maintained with the aid of some 5,000 employees located in the principal ports as well as by a small headquarters staff at Washington. Possession and control of the vessels remained at all times in the United States and physical operation was the exclusive responsibility of the vessel's master as a direct agent and employee of the United States who, under Article 3A(d) of GAA 4-4-42, was employed by the Government to have and exercise in its behalf the fullest control, responsibility and authority, exclusive of the shoreside agent, in respect of the navigation and management of the vessel.

Of special pertinence are the Operations Regulations issued to general agents. These show that the agents were allowed no authority and scant influence over the vessels and their masters but were rigorously confined to serving as the channel of communication between War Shipping Administration and its shipmasters and to the management of the accounting and certain other shoreside business operations of the vessels. As even the Operations Regulations are extremely voluminous, there is attached a summary of the more important material.

Very truly yours,

(Sgd.) Francis B. Goertner

General Counsel

Enclosure

SUMMARY OF PERTINENT OPERATIONS REGULATIONS

Operations Regulation No. 4 provides: "*General Agents shall assign to each new vessel . . . a master, chief mate, chief engineer and first assistant engineer, approximately*

thirty (30) days prior to the completion and delivery date. All other officers and department heads, including radio operators and chief stewards as authorized by War Shipping Administration shall be assigned approximately ten (10) days prior to such date * * * The unlicensed personnel, except as otherwise provided for herein, shall be placed on the vessel effective as of the date of delivery to the general agent."

Regulation No. 9, Supplement No. 1 provides: "*General Agents are authorized and directed to employ as a member of the crew, one junior third mate * * ** The terms of employment shall be in accordance with the General Agent's applicable collective bargaining agreement as provided in Article 3A (d) of the Service Agreement."

Regulation No. 12, Supplement 1, provides: "It is clear from the provisions of Article 3A (d) of the General Agency Service Agreement that *Masters and crew members are employees of the United States*, but no specific provision is made in the GAA, TCA, or BA agreements as to whether other personnel are employees of the United States or of the Agents, General Agents, or Berth Agents. * * * *Excepting only additions to the vessel's crew and employees of independent contractors, personnel employed by General Agents pursuant to Operations, Regulation No. 12 are employees of the General Agent and not of the United States. Other personnel directly employed by Agents, General Agents, and Berth Agents (and their Sub-Agents) to perform work in connection with vessels or their cargo and special work incident thereto, including shore gangs, checkers, tallymen, watchmen, guards, coal trimmers, and other extra labor, but excluding relief officers, shore relief, and crew members, are employees of such Agents and not of the United States.*"

Regulation No. 15, Directive No. 2 provides: "The master of a vessel has full discretion in signing on crew members and may reject any person seeking employment * * *. Records shall be kept of the names of those rejected and of the reason for rejection and shall be submitted to the port office of the Recruitment and Manning Organization of the War Shipping Administration in the port in which the rejection occurs."

Regulation No. 16, Directive No. 3, provides: "*When vessels are part of an active task force or are operating in theatres of war, the masters are subject to the order of the Commanding Officers of the appropriate force or theatre, and disobedience on the part of the master and crew to such orders may subject the master and crew to military discipline. When vessels are not part of an active task force or are not operating in theatres of war, the control and authority over the vessel rests solely with the master, subject to the directions of the War Shipping Administration.*"

Regulation No. 30 provides: "*General Agents * * * are instructed to notify the masters of such vessels to bolt down securely deep tank covers even when the deep tanks are used for carrying dry cargo.*"

Regulation No. 42 involves safety precautions aboard merchant vessels and provides: "*General Agents * * * are therefore directed to instruct the master and chief engineer aboard each vessel to ascertain prior to proceeding to sea, the condition of the floor plates in the engine room and fireroom of their vessel * * * to take the necessary steps to have them firmly bolted.*"

Regulation No. 43 involves fuel oil conservation and provides: "*General Agents are directed to instruct*

masters that wherever practical, water shall be utilized for ballast purposes in lieu of fuel oil.

Regulation No. 46 requires General Agents to issue appropriate instructions to masters and others regarding the War Shipping Administration's regulations that "*responsibility for the stowage of cargo, including the quantity to be loaded, the distribution of the cargo and the manner of stowage, should rest with the master.*" Shore personnel of WSA and General Agents "*should go no further than to make suggestions, subject always to the master's approval or disapproval, and should be careful to avoid the direction or supervision of the stowage of cargo.*"

Regulation No. 48 provides: "General Agents are directed *to instruct masters* that stores, supplies, and equipment are to be ordered through the vessels' *port agents.*"

Regulation No. 50 involving crew advances in foreign ports provides: "*General Agents are . . . directed to caution masters and crews of vessels calling at ports in foreign countries to discontinue payment in dollar currency and to refrain from transactions in United States money.*"

Regulation No. 51, Supplement 2, relates to pollution of navigable waters of the United States and provides: "All agents of the War Shipping Administration are hereby directed to give a copy of this Regulation to the master of each vessel . . . *Masters shall be instructed to post this matter on the ship's bulletin board or otherwise bring it to the attention of all ship's personnel.*"

Regulation No. 52 provides: "*General Agents are therefore directed to instruct masters of all vessels . . . to keep shaft alley doors closed at all times except when it becomes necessary to fill bearing reservoirs to make re-*

pairs * * * General Agents are further directed to *instruct masters* that a notice to this effect must be posted adjacent to the shaft alley door * * *"

Regulation No. 54 relating to pilferage of cargo provides: "*General Agents are directed to notify masters* that even under wartime conditions, it is still the responsibility of the master and his officers to see that cargo is delivered at destination free of damage and pilferage."

Regulation No. 56 requires the *General Agent* to instruct *masters* to familiarize themselves with protective measures relating to anti-gas preparations for merchant vessels.

Regulation No. 58 concerns the status of military and naval personnel assigned aboard merchant vessels and directs the general agents to *instruct* the masters in connection with and to comply therewith.

Regulation No. 62 provides: "* * * *each general agent is instructed to advise both the masters and chief engineers* of all vessels under their jurisdiction that fuel oil, and fresh water piping system suction are to be opened only on one oil and one water line when not fully in use * * *"

Regulation No. 63 concerning the employment of staff officers provides: "*General Agents * * * are directed to employ * * * a junior assistant purser* at a basic monthly salary of \$120.00."

Regulation No. 81 provides: "*General Agents of the War Shipping Administration are directed to instruct masters* to inform Armed Guard officers as to the time and place of convoy conferences in sufficient time to accompany the masters to the conferences."

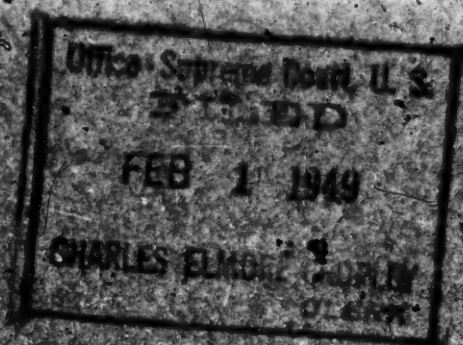
Regulation No. 83, provides: "*General Agents are hereby directed to instruct ship's personnel* of the follow-

ing practice to be observed in establishing quantities of bunker fuel oil acquired or discharged * * *."

Regulation No. 87 directs general agents that "*All masters and pursers shall be instructed to submit to the General Agent an accurate and detailed statement of expenses properly incurred for account of the vessel.*"

Regulation No. 99 provides: "General Agents are expected to provide the War Shipping Administration complete information regarding any irregularities concerning ships' stores, supplies and equipment, including slop chest property * * * *General Agents are directed to instruct all masters to prepare form SA-1, Master's Report of Loss, copy attached, on every occasion * * * General Agents should advise masters regarding their requirements of copies of the reports in addition to the copies required by the WSA.*"

LIBRARY
SUPREME COURT, U.S.



No. 179

In the Supreme Court of the United States

OCTOBER TERM, 1948

LILLIAN A. WEADE, FREDERICK M. WEADE, AND
ROBERTA L. STINEMEYER, PETITIONERS

DICHMANN, WRIGHT & PUGH, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1948 .

No. 179

LILLIAN A. WEADE, FREDERICK M. WEADE, AND
ROBERTA L. STINEMEYER, PETITIONERS

v.

DICHMANN, WRIGHT & PUGH, INC.

***ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT***

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Virginia (R. 24-26) are not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 123-127) is reported at 168 F. 2d 914.

JURISDICTION

The judgment of the Court of Appeals was entered May 13, 1948 (R. 128). The petition for a writ of certiorari was filed July 27, 1948, and was

granted October 11, 1948 (R. 132).¹ The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED²

1. Whether respondent, a general agent of the War Shipping Administration under the GAA 4-4-42 husbanding agreement, was the owner *pro hac vice* of the government-owned and operated vessel here involved, or was otherwise a common carrier, and therefore liable in either case for an assault upon a passenger, committed by a crew-member who was an employee of the United States and not of respondent.

¹ On November 22, 1948, the Court also granted certiorari in No. 351, *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 360, *Fink v. Shepard Steamship Company*, and No. 430, *Gaynor v. Agwilines, Inc.*, and set those three cases down for hearing immediately following the instant case. All four cases involve the question of the liability of general agents of the former War Shipping Administration. The Solicitor General appears for the general agent in all four cases, because in accordance with the wartime general agency agreement between the agent and the War Shipping Administration, the United States is obligated for any recovery effected to the extent not covered by insurance (W.S.A. Form GAA 4-4-42). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the most substantial part of all losses. House Merchant Marine and Fisheries Committee Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847. The defense of such actions is assumed by the Department of Justice whenever it appears to be required by the public importance of the question involved.

² See also the Question Presented in the Brief for the Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351, pp. 2-4.

2. Whether petitioners can recover, as third party beneficiaries, from respondent, a general agent under the GAA 4-4-42 husbanding agreement, for an alleged breach of its duties to the United States under that agreement.

3. Whether respondent, as such general agent, is liable to petitioners under general tort law, in the absence of proof of gross negligence in its procurement of the crew for engagement by the master on behalf of the United States.

4. Whether, in any event, the evidence in the record as to respondent's alleged negligence in performing its duties under the GAA 4-4-42 husbanding agreement was sufficient to permit the submission of the case to the jury.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations relating to the status and control of War Shipping Administration seamen are set forth in Appendix A to the Brief for the Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351.

STATEMENT

Petitioners Lillian A. Weade and Roberta L. Stinemeyer purchased tickets and stateroom cards, on July 25, 1945, for transportation and sleeping accommodations as passengers on the War Shipping Administration SS *Meteor* from Norfolk or Old Point Comfort, Virginia, to Washington, D. C., on August 3, 1945 (R. 22-23). Both the tickets,

which were in the standard form prescribed by WSA, and the stateroom cards expressly stated that they were issued by—

Washington-Hampton Roads Line

Operated by the United States of America

War Shipping Administration

and expressly identified respondent Dichmann as "Agent" and I. S. Walker as "Gen. Passenger Agent" for the WSA (R. 22-23). More specifically, respondent Dichmann, Wright & Pugh, Inc. was a "general agent" or ship's husband employed by the United States under the wartime GAA 4-4-42 husbanding agreement to operate the accounting and certain other parts of the shoreside business of the *Meteor* and some twenty other vessels of which WSA was operating owner in possession and control (R. 81-96, 55).

The facts which gave rise to petitioners' claims can be briefly summarized. Petitioners Lillian A. Weade and Roberta L. Stinemeyer retired to their stateroom about 11:00 p.m., the night of August 3, 1945, Mrs. Stinemeyer taking the upper berth and Mrs. Weade the lower. The weather was hot and they attempted to obtain the maximum ventilation. Despite the warning notice posted in the stateroom that passengers must keep the glass or shutters of the windows closed during the night and the fact that the window opened directly upon the boat deck of the vessel, Mrs. Weade and Mrs. Stinemeyer left open the window, leaving both the glass and the

shutter open and down, and they also left the door into the passageway ajar. About three o'clock of the following morning, a man entered the room by way of the open window, assaulted Mrs. Weade, and left the room by the same window. The second cook of the vessel, a Negro named Jack Lester Barnes, was charged with the offense. He afterward proved to have had a criminal record for fighting and knife carrying, but not for any offense comparable to that here involved (R. 28-29), and there was no evidence that his record was known to respondent. He was subsequently tried, convicted and executed for the offense.³

Originally petitioners brought two separate suits against respondent alone⁴ and petitioner Lillian A. Weade brought a separate suit against the United States alone.⁵ The suit against the United States was held in abeyance while the two suits against respondent were ordered consolidated for trial (R. 11) and gave rise to the present proceed-

³ The details of the facts concerning the operation of the vessel and the employment of Barnes are discussed in detail in Point III, *infra*, p. 32 and need not be repeated here.

⁴ *Roberts L. Stinemeyer v. Dichmann, Wright & Pugh, Inc., and George C. Hudgins*, United States District Court, Eastern District of Virginia, Norfolk Division, Civil No. 616, and *Lillian A. Weade and Frederick M. Weade v. Dichmann, Wright & Pugh, Inc., and George C. Hudgins*, United States District Court, Eastern District of Virginia, Norfolk Division, Civil No. 617.

⁵ *Lillian A. Weade v. United States of America*, United States District Court, Eastern District of Virginia, Newport News Division, Admiralty No. 80.

ings. The complaints against respondent alleged that the *Meteor* was operated by respondent as a common carrier, and that petitioners were injured because of respondent's failure to provide protection for respondent's sleeping passengers against the personal misconduct of respondent's employees, because of respondent's failure to use due care to select competent and careful employees, and because of respondent's failure to provide reasonable safeguards for the protection of passengers on the vessel and to comply with the laws relating thereto (Weade, para. 2, R. 2; Stinemeyer, para. 2, R. 7). Respondent answered denying generally the charges of negligence and want of care and pleading contributory negligence; in particular, it denied that it was a common carrier or that it owned or operated the vessel, or that the master, officers, and crew of the vessel were its employees, and it alleged that, on the contrary, the *Meteor* was operated by the United States of America, War Shipping Administration, that it was manned by government employees, and that respondent's only relation to the vessel was that of general agent servicing the vessel in accordance with the provisions of the standard form of agency agreement (R. 3-6, 8-10).

The trial court instructed the jury that the relation of respondent to petitioners was that of a common carrier which owed Mrs. Weade and Mrs. Stinemeyer the duty to "use the utmost or highest degree of practicable care and diligence" and that

respondent "was the principal and the operator of the Steamship *Meteor* at the time in question" (R. 14, 18). A verdict against respondent resulted and a motion for judgment notwithstanding the verdict was denied, the district judge holding that "While the case of *Hust v. Moore-McCormack Lines, Inc.*, 328 U.S. 707, is not precisely in point, it is my view that it is controlling" (R. 24). Judgment for petitioners was entered accordingly (R. 27). On appeal, the court below reversed, in an opinion which held that respondent was not liable to passengers since it was not the owner *pro hac vice* or the principal operating the vessel and so not subject to the duty of a common carrier (R. 123-127). The court observed that if the lesser duty owed to an invitee was not to be attributed to the agent, under *Caladrola v. Eckert*, 332 U.S. 155, *a fortiori* the more onerous duty owed by a carrier to a passenger should not be here. The court below did not, therefore, reach respondent's assignments of error raising the questions of petitioners' gross contributory negligence and the several other issues which we point out hereafter (*infra*, p. 36).

SUMMARY OF ARGUMENT

On the authority of *Caladarola v. Eckert*, 332 U.S. 155, the court below held that respondent was not an operating agent or owner *pro hac vice* under the terms of the GAA 4-4-42 agreement under which the vessel here involved was being husbanded by respondent. Petitioners do not argue that point,

which is fully discussed in the Brief for the Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351, this Term, to which the Court is respectfully referred. Petitioners' contentions are (1) that respondent was a common carrier who owed a duty of special care to them, and also (2) that they were entitled to recover because of alleged negligence of respondent in complying with its undertakings to the United States under the general agency agreement, and also under general tort law.

I.

The court below correctly reversed the district court on the authority of the *Caldarola* decision, which held that general agents acting under the GAA 4-4-42 husbanding agreements were not operating agents in possession and control of the vessel, or owners *pro hac vice*. The district court, after examining the GAA 4-4-42 agreement, had erroneously ruled and instructed the jury that respondent "was the principal and the operator of the Steamship Meteor." Its further instruction, that respondent was a common carrier by virtue of the agreement, stemmed from the same mistaken interpretation of the general agency agreement and was not an alternate ground of liability, as the court below properly recognized.

Even assuming that petitioners correctly interpret the district court's charge as holding that, while respondent was not an operating agent, it was a common carrier by reason of the duties

placed upon it by the GAA 4-4-42 agreement, that charge was erroneous. "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place." *The Niagara*, 21 How. 7, 22. It is immaterial as to whether transportation is performed in the capacity of principal or that of agent. But the asserted carrier's functions must relate to the physical movement of goods or passengers. Services not involving physical movement have always been held not to constitute the party rendering the services a common carrier. An examination of the functions performed by respondent under the general agency agreement establish that respondent, at the most, only serviced or "husbanded" the Government's vessels and thus was not a common carrier. The United States, and not respondent, transported petitioners.

Since respondent was not the owner *pro hac vice* of the vessel, nor was it independently a common carrier, the district court's charge, based on these erroneous theories, which petitioners accepted without asking for further or different instructions, was incorrect under the *Caldarola* decision, and the judgment of the court below for respondent should therefore be affirmed.

II

Petitioners now contend that respondent is also actionably liable to them for negligence in per-

forming its obligations to the United States under the general agency agreement, which petitioners treat as a third party beneficiary contract, as well as under the general principles of tort law applicable to agents. Even if correct in these contentions, petitioners could only assert liability for negligence in the procurement of crew members and not in the affording of proper safeguards aboard the vessel, since the latter is solely a function of the master of the vessel, an independent employee and agent of the United States.

A. The GAA 4-4-42 agreement was not a third party beneficiary contract. The obligations assumed by the agent under that agreement were for the benefit of the United States, not of third persons. It is clear that before a stranger can sue for breach of a contract to which he is not a party, he must show that it was intended for his direct benefit. *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230. Petitioners purport to find support for their third party beneficiary contention in Section 16 (a) of the agency agreement which *inter alia* provides that the United States shall save the agent harmless against claims of passengers. But Section 16 (a), taken as a whole, discloses that it was intended to protect general agents against their undoubted liability for the negligence of their own employees in doing the work of husbanding the vessel and against the vagaries of claims of various third parties, even if

unfounded, but not to confer rights against general agents upon third persons.

B. Under general tort law, respondent would be liable to passengers only for its own gross or wilful negligence in the procurement of crew members. Any vicarious liability for the wrongful acts of the master and crew rests upon the United States, whose employees they are, and not upon the agent. The agent is liable only for its own torts or those of its agents and employees who are doing its work. Here, the only function of the agent which related to petitioners' claims was to procure and make available to the master members of the crew for engagement by the United States. In procuring employees for others, an agent is liable to third persons only for gross negligence or wilful disregard of the rights of such third parties. Here there was no such negligence.

III

The evidence of gross negligence or wilful disregard of the rights of third persons is totally inadequate to justify submission of the case to the jury. The crew member who committed the assault was furnished through a recognized employment agency operated by respondent's principal, the United States. Manpower was in short supply and choice was limited. While the crew member had a criminal record, that record was unknown to respondent, nor was respondent placed upon notice,

even if authorized to inquire. In any event, the criminal record, for fighting and knife carrying, did not suggest the probability of his committing the crime of rape. Evidence of alleged negligence in the selection of other crew members is likewise inadequate, if not wholly wanting.

IV

Should this Court disagree with the foregoing arguments and reverse the court below on any of the grounds here urged by petitioner, then it is submitted that the case should be remanded to the court below with directions to pass upon the following questions, raised by respondent on its appeal to that court, but not passed upon below. Those points were: (1) that the district court lacked jurisdiction over petitioner Roberta L. Stinemeyer who, in any event, was not entitled to recovery; (2) that petitioner Frederick M. Weade was improperly joined as a party plaintiff; (3) that the contributory negligence of petitioners Lillian A. Weade and Roberta L. Stinemeyer bars any recovery as a matter of law, or serves to make the verdicts excessive; (4) that on any view of the evidence the verdicts were excessive; and (5) that the district court should have declared a mistrial because of prejudicial statements before the jury concerning insurance.

ARGUMENT

In *Caldarola v. Eckert*, 332 U.S. 155, this Court held that a "general agent" employed, as is re-

spondent here, under the GAA 4-4-42 husbanding agreement to manage the shoreside business of a vessel owned and operated by the United States, is not an operating agent nor an owner *pro hac vice* in possession and control of the vessel and hence owes no duty to protect third parties from injury while aboard the vessel. The court below, upon the authority of the *Caldarola* case, reversed the district court which had reached an opposite conclusion as to the effect of the GAA 4-4-42 agreement. Petitioners, while not abandoning the point, neither argue nor stress the contention that respondent was the operating agent or the owner *pro hac vice* in possession and control of the *Meteor*. In the Brief for Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351, this Term, we have fully discussed the non-liability of a general agent, such as respondent, on claims arising out of the navigation, physical management, and operation of a government-owned and operated vessel, and for reasons therein set forth we submit that respondent was not the operating agent nor the owner *pro hac vice* in possession and control of the *Meteor*.

Petitioners strenuously contend, however, that the court below erred primarily in failing to hold that respondent was a common carrier, in its capacity as agent, and required to exercise the highest degree of care in selecting proper crew members and otherwise to afford proper safe-

guards for petitioners' passage, and that its failure to exercise that degree of care constitutes actionable negligence (Br. 11, 16, 18). They also contend that under the provisions of the General Agency Agreement, which they attempt to treat in certain aspects as a third party beneficiary contract, as well as under general tort law, respondent may likewise be held liable to petitioners for an alleged failure to select a proper crew and to establish proper safeguards for petitioners' passage (Br. 12, 14, 15, 16, 17, 22, 26).

We submit, on the contrary, that respondent was not, and did not hold itself out to be, a common carrier; that the GAA 4-4-42 husbanding agreement was entered into exclusively for the benefit of the United States and not of third parties; and that while respondent might be held liable to third parties for gross negligence in the procurement of employees for the United States, in this case evidence of the alleged negligence of respondent is totally inadequate for submission to the jury on that question.

I

Respondent is not liable to petitioners as a common carrier and the court below correctly reversed the district court on the authority of the *Caldarola* case.

Although the brief of petitioners is neither clear nor specific as to the differentiation of the points urged as bases for reversal, it seems a fair statement of petitioners' case that, in order to avoid the

dispositive precedent of *Caldarola v. Eckert*, 332 U.S. 155, on the issue of whether respondent was owner *pro hac vice* or "operating agent," petitioners predicate liability primarily upon the theory that respondent, in its capacity as agent, was a common carrier which had breached a duty owed to passengers of not only procuring a qualified crew but of "affording proper safeguards" for petitioners' protection while being transported (Pet. Br. pp. 11, 17-20, 26).

A. The district court improperly held respondent liable as owner pro hac vice or operating agent.

—Apparently, petitioners seek to ground liability upon a portion of the trial court's charge to the jury in which it concluded that "Under the law of this case, by virtue of the contract which I have referred to, the defendant, Dichmann, Wright & Pugh, is what is known as a common carrier, or engaged in business as a common carrier * * *

(R. 17). But petitioners misconstrue this instruction. In fact, the District Judge had not concluded that respondent was a common carrier independently of any determination of its status as owner *pro hac vice* or "operating agent". He had reached that conclusion as a result of his prior determination that respondent was operating the steamship *Meteor* at the time in question and hence was the owner *pro hac vice*. (There can, of course, be no doubt that if respondent was operating the vessel—as distinct from its business—it was necessarily

a common carrier.) In his opening remarks, the District Judge stated (R. 14):

Gentlemen, the first question presented in this case concerns the status of the defendant, Dichmann, Wright & Pugh, Incorporated, on the question of liability for any negligence on the part of the officers or crew, or officers or employees, of the Steamship *Meteor*. There has been admitted in evidence a contract between the defendant, Dichmann, Wright & Pugh, and the War Shipping Administration of the United States. That contract which has been referred to was admitted for the purpose of showing the status of the defendant, Dichmann, Wright & Pugh, Incorporated. * * * You are told that the Court has interpreted the contract, and I now charge you, as a matter of law, that the defendant, Dichmann, Wright & Pugh, may be responsible for any act of negligence on the part of the steamship personnel, as that term is defined later. *In other words, gentlemen, for the purpose of this case, the defendant, Dichmann, Wright & Pugh, was the principal and the operator of the Steamship Meteor at the time in question.* [Emphasis supplied.]

Thus, in the latter portion of the charge quoted above, when the court referred to respondent as a common carrier which owed a duty to exercise the highest degree of care, the court was merely instructing the jury as to the character of the liability.

ty of a principal operating a vessel as owner *pro hac vice* in possession and control, and was not holding that there was an alternate ground of liability irrespective of the absence of such status. Therefore, the Court of Appeals properly recognized that the issue before it was whether respondent was the principal and owner *pro hac vice* operating the vessel, and that liability existed "if, but only if, we can read 'the contract so as to find the Agents to be owners *pro hac vice* in possession and control of the vessel.' " (168 F. 2d at 915). As we show in our Brief for Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351, this Term, the *Caldarola* case is decisive on this issue and was rightly decided. The decision of the court below is accordingly correct.

B. *Respondent, as husbanding agent, was not a common carrier, nor liable as such.*—Assuming *arguendo* that petitioners correctly interpret the charge to the jury as characterizing respondent as a common carrier even though it was not owner *pro hac vice*, a holding that respondent who had contracted with the War Shipping Administration to be a ship's husband, to issue tickets, and to arrange for transportation of passengers, was a common carrier by virtue of the duties imposed upon it by that contract lacks both authority and principle to support it.

1. Under general law, "a common carrier is one who undertakes for hire to transport the goods of

those who may choose to employ him from place to place." *The Niagara*, 21 How. 7, 22; *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211; 1 Hutchinson, *Law of Carriers* (3d ed. 1906); sec. 47; 1 Michie, *Law of Carriers* (1915 ed.) sec. 1. It is, of course, immaterial whether the service rendered is as principal or as agent. *Union Stockyard & Transit Co. v. United States*, 308 U.S. 213; *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296; *Fleming v. Railway Express Agency, Inc.*, 161 F. 2d 659 (C.A. 7). Nor is the transporter's status as a carrier changed because it renders only a part of the transportation service. Thus, a terminal company or stockyard company may be classified as a common carrier. See, e. g. *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296; *United States v. California*, 297 U.S. 175; *Union Stock Yard & Transit Co. v. United States*, 308 U.S. 213. And since "the character of the service, in its relation to the public, determines whether the calling is a public one," *id.* at 220, the physical facilities for carriage need not be owned by the carrier. Cf. *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174; *Powell v. United States*, 300 U.S. 276; Section 1(3) of the Interstate Commerce Act, 49 U.S.C. 1(3).

But, as analysis of the cases reveals, "the character of the service" must relate to a physical movement of goods or passengers by the company in question. A "common carrier is one who under-

takes * * * to transport," not one who undertakes to issue tickets and arrange transportation. Thus, this Court, when examining "the character of the service" rendered by companies alleged to be common carriers, has searched for the essential element of *transportation*. In *Union Stock Yard & Transit Co. v. United States*, 308 U.S. 213, it was pointed out that loading and unloading of livestock was transportation within the Interstate Commerce Act and at the common law. *Id.* at 219, 220. Referring to terminal facilities operated by the State of California, the Court found that "all the essential elements of interstate rail transportation are present in the service rendered by the State Belt Railroad. They are the receipt and transportation for the public, for hire, of cars moving in interstate commerce." *United States v. California*, 297 U.S. 175, 182. Earlier, in *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296, Mr. Justice Brandeis noted that "the service which it [the Terminal] performs is * * * conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered," that the Terminal "undertakes to carry," that "the Terminal contracts to transport," and that "it doubtless performs the loading and unloading." *Id.* at 305-306.

On the contrary, where services of a kind ordinarily performed by a carrier but not related to actual movement are performed by other com-

panies for the carrier, such other companies have not been held to be carriers. In *Ellis v. Interstate Commerce Commission*, 237 U.S. 434, a corporation leased refrigerator cars to shippers and railroads, and maintained icing plants at which it iced the cars, the railroad paying for the icing service. It was held that the corporation "has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary is not a common carrier." *Id.* at 443. Cf. *Fischer v. Oklahoma City*, 198 Okla. 22, 24, certiorari denied, 331 U.S. 824; *Larson v. Aetna Life Ins. Co.*, 19 Wash. 2d 601; *Strickler v. Schaaf*, 199 Wash. 372.*

2. Since respondent, by its contract with the War Shipping Administration did not undertake the physical operation of the vessels of the United States, but only contracted to service (husband) them, we submit that respondent was not engaged as a common carrier at the time in question and thus was not bound as such to use the utmost or highest degree of care. Article 3 A of the contract (R. 82-84, 96) defined the duties of respondent as

* *In re Rice*, 165 F. 2d 617 (C. A. D. C.), relied upon by petitioners (Pet. Br. pp. 19-20) to show that one may be a common carrier with less participation in the transportation of passengers than existed in the instant case, is wholly irrelevant. The lessor of the taxicab equipment in that case, who was held to be the carrier, would correspond here to the United States, not to respondent. That case, moreover, rests on the particular provisions of the District of Columbia Code and the Emergency Price Control Act.

General Agent. Respondent agreed "for the account of the United States" to: (a) "Maintain the vessels in such trade or service as the United States may direct * * *"; (b) "Collect all moneys due the United States under the Agreement and deposit, remit, or disburse the same * * * and account to the United States for all moneys collected or disbursed by it or its agents"; (c) "Equip, victual, supply and maintain the vessels, subject to such directions * * * as the United States may from time to time prescribe"; (d) "* * * procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. * * * The officers and members of the crew shall be subject only to the orders of the Master. * * *"; (e) "Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. * * * all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substantially * * * that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof"; (f) to "arrange for the transportation

of passengers when so directed, and issue or cause to be issued to such passengers customary passenger tickets. * * * See also Point III of our Brief for the Petitioner in No. 351, pp. 4-101.

Under Article 3 A (f) it was respondent's duty, as agent only, to "issue tickets" to passengers and "arrange for" their transportation "for the account of the United States" with the shipmasters to whom WSA entrusted the physical navigation and management of its vessels afloat. And the WSA-prescribed form of tickets and stateroom cards issued petitioners expressly stated they were issued by "Washington-Hampton Roads Line, Operated by United States of America, War Shipping Administration," and identified respondent as "agent" (R. 22, 23), so that it was made plain that respondent was not acting as carrier nor operating the line.

Nor could petitioners possibly have thought respondent was acting as a common carrier. Respondent had never done business as "Washington-Hampton Roads Line" or been connected with the line or with any similar service, until employed as agent for WSA. The "Washington-Hampton Roads Line" was a name given by WSA to the service of the Steamers *Meteor* and *District of Columbia* between Norfolk and Washington, when it was first organized by WSA, in order to distinguish that line from the line of the Norfolk and Washington Steamboat Company which had formerly operated one vessel in a similar service (R.

55-56, 58). Respondent had always been in the general steamship business and had not previously engaged in such a service as this; previously respondent had "operated" the "business" of some twenty cargo vessels for WSA under the GAA 4-4-42 agreement (R. 81-95), and when the Navy insisted that WSA provide nightly services between Norfolk and Washington, these two vessels were allocated to respondent under a passenger addendum (R. 95-96) to its regular GAA 4-4-42 husbanding agreement (R. 55-56, 66).

It is clear, therefore that the carriage was to be performed by the United States through the War Shipping Administration, and that respondent was employed solely as ship's husband and ticket agent "to arrange for the transportation" and not as a carrier which "undertakes to transport the goods of those who may choose to employ him." The provision in the contract that Bills of Lading were to exempt respondent from liability is utterly irreconcilable with the conception that respondent is a common carrier. It is significant that, in so far as our search of the cases reveals, such services as have been performed by respondent under its contract with the War Shipping Administration have never been construed as constituting the performer of the services a common carrier. Indeed, this Court has specifically refused to hold that "forwarders" of freight, who, like respondent here, merely arrange for transportation, are common

carriers, even though they solicit shipments, assemble them, assume responsibility for safe through carriage, select the carriers and route the shipments, break up the bulk shipment at distribution centers, take possession of the original small shipments, and arrange for delivery to the consignee. *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed *per curiam*, 309 U.S. 638; *Lehigh Valley R. R. Co. v. United States*, 243 U.S. 444; *Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R. Co.*, 220 U.S. 235.

C. Liability as "operating agent" or as "common carrier" are equally forbidden by *Caldarola*.

—On either theory of the trial judge's instructions, the decision of the court below against petitioners was correct and should be affirmed. If, as we think, the gravamen of the charge was the holding that respondent was "the principal and the operator of the Steamship *Meteor*" (R. 14), the court's imposition of liability upon respondent cannot be squared with the *Caldarola* decision. If, however, the district court proceeded on the theory that respondent was, in any event, a common carrier (and therefore "bound to use the utmost or highest degree of practicable care and diligence under the circumstances existing" (R. 18)), its basis for liability was equally erroneous, as we have shown. Accordingly, the verdict and judgment in favor of petitioners cannot stand. And judgment should be

entered for respondent, since the record does not disclose that petitioners asked for further or different instructions resting liability on the alternate grounds discussed hereafter.

II

Respondent is not liable to petitioners for failure to perform any duty required by the general agency agreement, and under general tort law could be liable to petitioners only for gross negligence.

Despite their failure to ask alternate instructions on the theory of liability on which they now rely, and assuming that the points may still be raised here, petitioners—in apparent recognition of the improbability of establishing that respondent was a common carrier—adopt a second line of attack and contend that in any event respondent was negligent in procuring proper crew members (Br. 11, 12, 14-17, 22), and in affording proper safeguards for passengers, both under the terms of the General Agency Agreement and under the general principles of tort (Br. 11, 16, 26). While they do not explicitly so state, they must, in the light of the instructions given to the jury, be suggesting that the court below should have remanded the case to the district court with directions for a new trial, at which time the question of negligence, on these alternate theories, would be submitted to the jury under different and appropriate instructions. We submit, however, that under the GAA 4-4-42 husbanding agreement the obligations of respondent

ran to the United States and not to those traveling on government vessels, and that under general tort law respondent would be liable only for gross negligence. Moreover, even if petitioners were successful in their contentions, respondent could be held liable only for negligence in the procurement of crew members, and not for "failing to arrange to protect passengers" (Br. 11, 16, 26). The authority of a "general agent" ends at the shore and it has no right, much less an obligation, to interfere with the master's management of the vessel as an independent agent and employee of the United States.

A. *The General Agency Agreement placed obligations upon respondent only in favor of the United States; it was not a third party beneficiary contract.*—The GAA 4-4-42 husbanding agreement—discussed in detail in Point III of the Brief for the Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351—discloses that its purpose was to provide for the management and operation of the shoreside business of vessels being physically operated by the United States. The obligations placed upon the agent were for the benefit of the United States as operating owner in possession and control, and not of third parties. The contract was carefully drawn to make certain that the agent had no authority over the master and crew, and no part in the navigation, physical management, and operation of the vessel itself. The

provision of the contract upon which petitioners seize, Article 3 A (d), is the one providing that the agent "shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel." It is significant that the master and not the agent was to requisition the men required to fill the complement and the agent was to act on his requisition. It is also clear that the crew was to be furnished to the master to enable the United States, through its agent and employee, the master, to man and navigate the vessel, and to transport the freight and passengers thereon. The agent was required to exercise reasonable care in the procurement of the crew, but that duty was owed to the United States, not to third parties.

As formulated by this Court, the rule as to third party beneficiaries is that "before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit." *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230; *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307-308; *National Bank v. Grand Lodge*, 98 U.S. 123; cf. *Prescott v. Collins*, 263 App. Div. 690, appeal dismissed, 290 N. Y. 811.

It is a general rule that public contracts are for the benefit of the community as a whole, not for the benefit of individuals. See 2 Williston, *Contracts*,

sec. 373 (Rev. ed. 1936). As restated by the American Law Institute, "a promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so * * *." See *Restatement, Contracts*, sec. 145.⁷ Thus, where a water company contracts to supply water to a municipality and the property of an inhabitant is destroyed by fire because of the failure of the company to supply water, it is the federal rule that there is no liability. *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220; cf. *Moch Co. v. Rensselaer Water Co.*, 247 N. Y. 160; *Mackubin v. Curtiss-Wright Corp.*, 57 A. 2d 318, 321 (Md.). Similarly, a user of the mails was denied recovery of consequential damages resulting from misdelivery of mail, in a suit on a postmaster's bond of which the United States was obligee. *United States v. National Surety Corp.*, 309 U.S. 165; cf. *Thomas P. Nichols & Son v. National City Bank*, 313 Mass. 421, certiorari denied, 320 U.S. 742 (F.D.I.C. contract).

⁷ Sec. 145(a) imposes liability where the intent is manifest in the contract, in light of the circumstances surrounding its formation, that the promisor shall make compensation. The illustrations under Sec. 145(a) are cases of explicit promises to indemnify for damage.

Petitioners purport to find in Section 16(a) of the Agency Agreement support for their contention that the contract itself made the agent liable to members of the public for failure to carry out its obligations to the United States. That section provides *inter alia* that the United States shall indemnify the general agent against all claims for injury to persons or property arising out of all claims and demands by passengers. But the section is, in effect, a blanket indemnity for all claims against the general agent on matters arising out of the performance of its agency. See our discussion of these and the related articles in the Brief for the Petitioner in No. 351, pp. 82-83. Not only are there many cases where agents may be liable to the public under general law for fault of their own employees, but it is also plain that the parties to the General Agency Agreement could well anticipate that courts would enter judgments against the general agents on claims which properly should have been asserted against the United States. The group of cases now before this Court emphasizes that fact by the divergence of views which they display, and even this Court has in the past been sharply divided on the question of liability. It is in this field that the indemnity provisions of Section 16(a) must be viewed as operative, and not as an attempt to confer rights on third parties.

We submit, accordingly, that whatever obligations might be placed upon the agent by the GAA

4-4-42 husbanding agreement, those obligations ran to the United States, not to third parties.

B. *Under general tort law respondent would be responsible only for gross or wilful negligence in the performance of its duty to procure the officers and men required by the master to fill the complement of the vessel.*—As we have shown in the Brief for the Petitioner in No. 351 (pp. 102-113), vicarious liability for the wrongful acts of the master and crew rests upon the United States, whose employees they are and whose work they do, and not upon the general agent. It is only for its own torts (those of its own employees in performing its own duties to the United States) that the agent is liable. Here the assault on Mrs. Weade was committed by an employee of the United States, a crew member, and any failure to exercise proper supervision over him, or to take general precautions to prevent such an occurrence was a matter of the internal management of the vessel, which rested upon the master, an independent agent and employee of the United States. The only function in respect of the crew members which respondent performed was to procure and make them available to the master for engagement by the United States.*

* The matter of discipline aboard the vessel was entrusted, not to the general agent, but to the master, as an independent agent and employee of the United States. See the discussion in the Brief for the Petitioner in No. 351, pp. 63-65, and *infra*, p. 36.

The general rule as to the liability of an agent in such circumstances has been set forth in the Restatement of the Law of Agency as follows:

§ 350. An agent is subject to liability if, by his acts, he creates an unreasonable risk of harm to the interest of others protected against negligent invasion.

§ 358(1). The agent of a disclosed or partially disclosed principal is not subject to liability for the conduct of other agents unless he assists them in the performance of a tortious act or directs or permits them to commit it.

§ 79, comment a. * * * The agents so employed are the agents of the principal and not of the employing agent, who * * * is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal; *unless he is negligent in their selection* * * * .
[Emphasis supplied.]

The general standard of care by which "negligence" is measured is defined by Section 282 of the Restatement of Torts as—

* * * any conduct, except conduct recklessly disregarding of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm.

It is hornbook law that "the standard established by law for the protection of others against unreasonable risk of harm," in the selection by one

agent of other agents or subagents of the principal, is no more than absence of gross carelessness or the wilful disregard of third persons' rights. *Donn v. Kunz*, 52 Ariz: 219, 223; *Smith v. Rutledge*, 332 Ill. 150, 155; *White v. Macoubray*, 309 Pa. 266, 268; *Weaver v. Foundation Co.*, 310 Pa. 310, 314. Thus, it is only if respondent acted, in its procurement of officers and crew for engagement by the master, with gross carelessness or wilful disregard of the rights of others that it can be held liable under general tort law. But as we show below (pp. 33-36), there was no negligence at all in this case, and plainly no gross negligence; accordingly, respondent, not being vicariously liable for Barnes's assault, may not be held liable for damages.

III

The record is barren of any substantial evidence of negligence by respondent in the performance of its duties of procuring crew members and arranging for petitioners' transportation.

We believe the record fully demonstrates that respondent was not guilty of any fault or negligence in performing its contractual duties to the United States of (a) procuring the crew for employment by the Government and (b) arranging for the transportation of passengers by the Government.

There is no evidence to support petitioners' charge that respondent was negligent in procuring Barnes for employment. Under the provisions of

Article 3A(d) of the GAA 4-4-42 agreement, the master of the *Meteor* was procured by respondent, and upon acceptance became an agent and employee of the United States, not of respondent, and the officers and crew were subject only to the master's orders (R. 83). In accordance with the agreement, respondent procured Captain George C. Hudgins as master, and aided him in obtaining a crew to man and navigate the vessel (R. 56, 58). Labor and employment conditions were abnormal in wartime and the turnover of men was very great (R. 33-34, 56-58, 71, 74). WSA maintained a recruitment and manning pool in Norfolk to which men reported and were assigned to WSA's various vessels, including the *Meteor*, bringing assignment slips to the vessel (R. 57, 60). Barnes, the accused colored cook, was thus sent from the pool by WSA's Recruitment and Manning Organization with an assignment slip (R. 60, 74). It was not respondent's duty, or indeed within its power, to make any further investigation after he had been passed by WSA and the Coast Guard.* But if respondent had made further investigation it may

* Respondent's president testified (R. 60):

"A. I can only say, in the case of this man, who had been previously handled by the governmental agencies, that we took their investigation as sufficient.

"Q. Do you have the investigation that was made by these other agencies as to this Negro man?

"A. No. When he came down with a slip from the pool and his certificate from the Coast Guard, that was sufficient."

be doubted that it could, consistent with government policy, have rejected Barnes. His "criminal record", on which petitioners rely so heavily, included no offenses of the character of which he was convicted here, but consisted of three convictions of "fighting," a charge of violating the probation law and one of carrying a concealed weapon (R. 28-29). It appears that on the night of the occurrence Barnes had been drinking, contrary to the regulations of "the company" (i. e., the Washington-Hampton Roads line) as well as of the Coast Guard (R. 41-42). But there was no evidence that he had done so before, or that the Government's shipmaster, much less respondent's shoreside personnel, was aware of such conduct. On the contrary, so far as was known, Barnes was unusually quiet and orderly (R. 74, 33).

Nor was there any evidence in support of petitioners' charge that respondent had failed to procure proper or sufficient watchmen. There were three decks to the vessel, and in compliance with Coast Guard regulations there were three watchmen whose duties were generally divided so that there were two inside or "saloon, [cabin] watchmen" and one "deck, [fire patrol] watchman" (R. 31, 37-39, 110). Petitioners attempt to argue that the duties of the watchmen must be so regulated that there is one man on each deck at all times (Br. 4, 13). But this is totally unsupported by the Coast Guard regulation which merely directs that

"Vessels carrying passengers shall during the night time keep a suitable number of watchmen in all patrol quarters and on each deck." (R. 39, 110). Petitioners have never attempted to prove or contend that the crew complement specified in the *Meteor's* documents required more than the three watchmen which the testimony shows were aboard, or that the master had requisitioned more men than respondent had furnished.

The watchman assigned by the master to the deck where the stateroom of Mrs. Weade and Mrs. Stinemeyer was situated possessed the proper seaman's certificates (R. 79-80, 112). He was properly instructed by the Government's master and officers in his duty to patrol inside and outside every twenty to thirty minutes and to remain alert, and appears to have done so (R. 80, 113-115). Much is also made of the fact that during his daytime off-duty hours Mr. Adkins, the watchman assigned to the deck where petitioners' stateroom was situated, was employed by a concessionaire to fix slot machines (Br. 4-5, 13). But the record shows that Mr. Adkins had been instructed that he could not repair the machines when he was on duty for the ship, but the Chief Purser, Mr. Rosenberg, simply took them out of service on such occasions (R. 111-112), and there is no testimony that Adkins had ever violated these instructions.

The record thus shows that there was no negligence by respondent, or, indeed, by anyone else

concerned. In any event, the matters of the assignment and orders of crew members and their supervision are questions of the internal management of a WSA vessel, which the United States had delegated exclusively to the master, and with which respondent had no right to interfere. Respondent's authority stopped at the shore, and the most it could do would be to report the master to the WSA port director. In sum, the record does not disclose any negligence of respondent at all, and certainly no gross negligence; and the negligence which petitioners charge is not of persons for whom this respondent is liable.

IV

Respondent's grounds of appeal not disposed of by the Court of Appeals

If, contrary to the contentions we have advanced above, this Court should hold either that respondent was a common carrier, or that the record contains sufficient evidence of gross negligence upon which the case should go to the jury on the issues of petitioners' putative rights as third-party beneficiaries under the general agency agreement, or of respondent's general tort liability, then it is respectfully requested that the cause be remanded to the court of appeals with directions that that court dispose of the points raised by respondent's appeal which were not decided by the court below at the prior hearing. Those points were (1) that the district court lacked jurisdiction over peti-

tioner Roberta L. Stinemeyer who, in any event, was not entitled to recovery; (2) that petitioner Frederick M. Weade was improperly joined as a party plaintiff; (3) that the contributory negligence of petitioners Lillian A. Weade and Roberta L. Stinemeyer bars any recovery as a matter of law or serves to make the verdicts excessive; (4) that in any event the verdicts were excessive; and (5) that the district court should have declared a mistrial because of prejudicial statements before the jury concerning insurance:—

1. If this Court should affirm the decision of the Court of Appeals for the Fourth Circuit in *National Mutual Ins. Co. of the District of Columbia v. Tidewater Transfer Co., Inc.*, No. 29, this Term, there is a jurisdictional lack of diversity of citizenship between petitioner Roberta L. Stinemeyer, a citizen of the District of Columbia, and respondent, Diehmann, Wright & Pugh, Inc., a Delaware corporation (R. 6-7, 8). At the pre-trial hearing, this issue as to diversity jurisdiction was raised by respondent, but the district court ruled against respondent's contention and consolidated petitioner Stinemeyer's case with the others. Irrespective of the question of jurisdiction, Roberta L. Stinemeyer may not be entitled to any recovery herein because she sustained no actual personal injuries as a result of the trespass by Barnes, nor was there any physical assault upon her person.

2. The claim of petitioner Frederick M. Weade, husband of petitioner Lillian A. Weade, was grounded on the deprivation of the services and society of his wife and the accrual of medical expenses as a result of the injuries sustained by her (R. 3). Under the law of Virginia, which appears to be controlling on the District Court for the Eastern District of Virginia in this suit, Frederick M. Weade has no justiciable claim and was improperly joined as a party plaintiff, since the Virginia statute (Code of Virginia, Section 5134) does not permit an action by the husband for services, loss of society, or expenses.

3. The issue of contributory negligence was submitted to the jury, which, by its verdict, necessarily found either that petitioners were not contributorily negligent or that any such contributory negligence was not the direct or proximate cause of the injuries. As this cause was on the law side of the district court, the question remains whether a verdict should have been directed against petitioners on this issue. And even if maritime law is applicable, the contributory negligence of petitioners revealed by the record would probably serve to make the verdict excessive.

4. Irrespective of the issue of contributory negligence, the verdicts returned by the jury of \$50,000 to Mrs. Weade, of \$5,000 to Mrs. Stinemeyer, and of \$1,000 to Mr. Weade, were probably excessive.

5. Lastly, the District Court should have declared a mistrial for prejudicial statements of petitioners, before the jury, concerning insurance, which impressed the thought that respondent was protected from all financial loss by government-provided insurance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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